

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Eugene Division

JEFF BOARDMAN, DENNIS)
RANKIN, ROBERT SEITZ,)
TODD L. WHALEY, LLOYD D.) No. 1:15-cv-00108-MC
WHALEY, SOUTH BAY WILD,)
INC., MISS SARAH, LLC,)
and MY FISHERIES, INC.,)
Plaintiff,)
vs.)
PACIFIC SEAFOOD GROUP,)
et al.,)
Defendant.)

BE IT REMEMBERED THAT on the 22nd day of
March, 2018, the above-entitled matter came on for
hearing before the HONORABLE MICHAEL J. McSHANE,
District Court Judge.

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PROCEEDINGS

Sunday, April 1, 2018, at 2:06 p.m.

THE COURT: Please remain seated. Thank you, folks. Good afternoon, everybody. Let's go ahead and go on the record, and we will call the case.

COURT CLERK: United States District Court for the District of Oregon is now in session; the Honorable Michael J. McShane presiding.

Now is the time set for civil case 15-00108, Boardman, et al., versus Pacific Seafood, et al., oral argument on a motion.

THE COURT: If I could have the attorneys, starting with plaintiff's counsel, please introduce themselves for the record.

MR. HAGLUND: Michael Haglund, and with me is Mike Kelly, and my associate, Eric Brickenstein.

THE COURT: Thank you, Mr. Haglund.

MR. FOSTER: Your Honor, I am Randy Foster from Stoel Rives, and to my immediate left is Tim Snider, and to his left is Rachel Lee.

THE COURT: It looks like a lot of people. I have a number of clerks who have been helping me on the various cases, so there's also some students from the Anti-Trust Class, University of Oregon who have

1 joined us today.

2 So I am going to ask you to do a little
3 old-school style, and that is begin your argument by
4 describing, not in -- obviously, I've read much of your
5 briefing. But if you could describe a little bit, for
6 the sake of some of our students, your claims, and it
7 doesn't have to be a lengthy opening argument. Maybe an
8 overview of the case, but with regard to this case.

9 I would like to start with plaintiffs.

10 Mr. Haglund.

11 MR. HAGLUND: Thank you, Your Honor. This
12 case originated in January of 2015, arose out of a
13 notice that we received from counsel for Pacific Seafood
14 Group that their client, Pacific Seafood, was
15 negotiating, or in the process of putting together a
16 transaction under which they would acquire Ocean Gold
17 Seafood, and all of its related companies.

18 Ocean Gold Seafoods is the largest seafood
19 processor on the West Coast, headquartered in West Port,
20 Washington. Its affiliated companies include Ocean
21 Protein, which is the largest fish meal processing plant
22 that processes fish waste, head, guts, et cetera, tails,
23 into fish meal product. And they also have the largest
24 capacity flash freezing and cold storage facility that's
25 owned by a company called Ocean Cold.

1 Now, after receiving that notice, we
2 contacted a variety of our clients, who included the
3 five, I think, class representatives in the Whaley case.
4 We talked to other fishermen, ultimately learned that
5 our clients had grave concerns about the additional
6 concentration in the market that would occur from
7 Pacific Seafood acquiring Ocean Gold Seafood. We had
8 secured a Temporary Restraining Order in the prior
9 Whaley case against the very same transaction, and
10 thought it was dead.

11 THE COURT: In terms of transaction, we're
12 just talking about, in this case, the West Port
13 facilities of Ocean Gold?

14 MR. HAGLUND: That's the entirety of their
15 facilities, I believe, Your Honor. So we investigated,
16 told Pacific Seafood we objected. We received
17 information through the fairly sieve-like, dock-talk
18 system that exists on the waterfront that the
19 transaction was about to close, to our surprise.

20 And we called up Pacific Seafood counsel.
21 This is also confirmed in the 9th Circuit opinion, but
22 we called up Pacific Seafood's counsel and asked for a
23 representation that the transaction was not going to
24 close at the end of that week in January -- or the
25 Friday was January 23rd in 2015, when the accounts of

1 John Stephens, one of Pacific's lawyers -- or still one
2 of Pacific's lawyers said, No, I don't know.

3 So we then proceeded to file suit to
4 challenge that, or to stop that transaction from
5 occurring. The very next day secured a TRO from Judge
6 Panner, and then briefed up the -- there were two
7 competing motions then briefed, Your Honor, or filed and
8 briefed; motion to dismiss on the part of Pacific
9 Seafood Group, a motion for preliminary injunction on
10 our part. Both were heard in Medford before Judge
11 Panner.

12 And ultimately, in March, Judge Panner
13 issued a preliminary injunction. That subsequently was
14 appealed to the 9th Circuit and argued nine months
15 later, and the case was stayed by Your Honor while it
16 proceeded up to the 9th Circuit.

17 Ultimately, as to the preliminary
18 injunction, the 9th Circuit, in a pretty comprehensive
19 opinion, affirmed the broad preliminary injunction in
20 its entirety. The case then is back before Your Honor,
21 and we proceed with some discovery.

22 And what, I think, leads us here today is
23 the fact that when we made our expert witness
24 disclosures, our expert, our then-expert, Dr. Hans
25 Radtke, clarified his opinion slightly from that which

1 he offered at the time of the preliminary injunction.

2 But before I shift to that part of our
3 argument, Your Honor, I would like to address some of
4 the briefing that came in just in the last ten days
5 where we are charged, I think, with a pretty serious
6 charge, my law firm and the plaintiffs in this case.
7 And I want to address that briefly before turning to the
8 merits of the Pacific Seafood motion.

9 In that briefing that they filed a week ago
10 Monday, they contend that the three plaintiffs in this
11 case are nothing more than straw men who have no
12 interest in what is occurring in this case, and that our
13 firm is colluding with third parties to try to force the
14 sale of the Ocean Gold company and its affiliates at a
15 depressed price.

16 And effectively, it's a very serious charge
17 that we're attempting to commit a fraud on the Court
18 through collusion with third parties disconnected from
19 our true plaintiffs. And we filed a declaration from
20 every one of the remaining three plaintiffs in the case
21 last Friday, declaration from me, declaration from Ed
22 Backus and Richard Carroll who -- all of them stating --
23 completely rejecting this, I think, extraordinary
24 stretch of a theory by Pacific Seafood Group. We take
25 our responsibility as officers of the court seriously.

1 We -- this case began because -- we had
2 four of the class reps as plaintiffs in this case. We
3 had three -- we have two remaining.

4 THE COURT: You are left with three
5 plaintiffs who, quite frankly, it does seem like at
6 times you are a case in search of a plaintiff. You have
7 three plaintiffs who don't fish for whiting. That's one
8 of your markets. You have got two plaintiffs who
9 haven't been to the West Port market in 20 years, and
10 you have one that's been six years.

11 So it is -- and I understand that these
12 allegations have been made about some sort of collusion,
13 but, I mean, that has to do with some counterclaims and
14 discovery on counterclaims that we will get to.

15 But one of the threshold matters is the
16 anti-trust standing and anti-trust injury. That's where
17 I am starting to struggle with where you are at with
18 your plaintiffs. Despite their good faith intentions of
19 helping competition in the fishing markets, have these
20 folks actually suffered any anti-trust injury?

21 MR. HAGLUND: Yes, they have. And let me
22 explain. What Pacific Seafood is trying to do at this
23 point, in this case, is preemptively lock the plaintiffs
24 into the statement in Dr. Radtke's expert witness
25 disclosure that was filed -- or was tendered to them on

1 June 30th where he states that there are six relevant
2 markets on the West Coast. And his declarations in the
3 Whaley case, along with Professor Wyland in the Whaley
4 case. And then his declaration in this case in February
5 of '15 he states the market is the whole West Coast,
6 from Fort Bragg to the Canadian border.

7 But in his expert witness disclosure that
8 was filed or tendered to the other side on June 30th, he
9 says that there are six relevant geographic markets, but
10 he also says on page 37 of that roughly 50-page
11 disclosure that Pacific Seafood's dominance in the West
12 Port market is six -- or tied to port clusters and the
13 geography tributary to each port cluster.

14 But he says in that very disclosure that
15 Pacific's dominance in the West Port market will impact
16 markets to the south, to the detriment of fishermen,
17 coastal communities, and the environment. He also says
18 on the very same page that he reserves the right to
19 supplement his disclosure, based upon ongoing discovery
20 and in response to Pacific Seafood's own expert reports,
21 none of which have been produced yet.

22 And we have a situation, Your Honor, where
23 in my experience the issue of market definition in an
24 anti-trust case is a very complex one. And it's complex
25 in its nuance, because you are at the intersection of

1 anti-trust law and the field of economics. And in the
2 typical case, and we handle quite a number of these, the
3 plaintiff generates its expert witness disclosure, then
4 the defendant does the same, and the plaintiff then
5 responds in some sort of rebuttal filing.

6 And between the time of the initial
7 disclosure by an expert and the final expert witness
8 statement that is generated before -- under the wave of
9 filings that precede an actual trial, you will see
10 clarification, modification, change based upon
11 discovery, and comment from the other side. We never
12 got through that process.

13 THE COURT: There's still a threshold
14 matter of anti-trust injury. And if I am understanding
15 right, you seem to be conceding, maybe your three
16 plaintiffs, represented plaintiffs, may not be injured
17 in the West Port market, but under an umbrella theory --

18 MR. HAGLUND: No, we're not -- we do not
19 concede that or take that position. If you look at --
20 just under Dr. Radtke's report, and to the -- because if
21 you treat it as six markets, they still have involvement
22 because they all have Washington permits. The two
23 fishermen, Lloyd Whaley and Dennis Rankin, who remain in
24 the case, who have Federally issued, through the
25 National Marine Fisheries Service IFQ, or Individual

1 Fishing Quota, share in each of the species, including
2 whiting. The areas where one can fish as a holder of
3 that quota share for West Coast groundfish is the entire
4 Federally regulated zone where those species abound,
5 which is from the northern half of California to the
6 Canadian border.

7 So Mr. Whaley, for example, he leases out
8 his Federally regulated quota share, so a concentration
9 in one of six markets, or the entirety of the West
10 Coast, depending upon how it ultimately shakes out, as
11 we work through the balance of discovery and Dr. --
12 Professor Sexton issued his disclosure, we have got
13 involvement in those markets. And the leasing
14 opportunity for both plaintiffs as to quota share is
15 very much impacted by a concentration in whatever market
16 you have got.

17 You also have changes, Your Honor, just in
18 the biological abundance and migration of the species.
19 Dr. Radtke points out that one of the reasons he doesn't
20 identify the Eureka port cluster in Northern California
21 as a whiting market is that it has been four or
22 five years since whiting were down that far south and
23 caught and delivered to Eureka.

24 So you can have changes in biological
25 abundance in the future that have a fisherman who was

1 concentrating in Central Oregon, off the Central Oregon
2 coast, is -- and we cite to the deposition of lead
3 plaintiff, Jeff Boardman, on this very point where he
4 makes the point that he's been -- he's caught shrimp.
5 He's a shrimp specialist off of West Port in the last
6 several years within ten miles of West Port, but steamed
7 south to deliver it to Newport.

8 The reality is that he's got a Washington
9 permit to shrimp, and the biological abundance is there.
10 And he says, I have delivered into West Port in the
11 past. There's the potential he might deliver to West
12 Port in the future.

13 THE COURT: How is that different than the
14 case where there's loss of potential for -- you know,
15 cinema owners, or the guy who developed some sort of
16 pest-control device where he planned on going into these
17 markets in the future, and he could certainly get into
18 the markets in the future but the activity wasn't
19 causing him any particular -- the plaintiff in this
20 case, any particular individualized anti-trust injury,
21 other than making it more difficult for his investments
22 in the future?

23 MR. HAGLUND: Let me make this point, Your
24 Honor. In this case, in Boardman, there's no claim for
25 damages. We have had serious interest by the State of

1 Oregon in this case with them having filed an amicus
2 brief in support of the injunction back in the spring of
3 2015. A brief in which they said, This level of
4 additional concentration is presumptively unlawful under
5 the anti-trust laws.

6 But we are solely -- this is a very
7 important distinction going directly to the point you
8 just made. We are not suing under Section 4 for treble
9 damages of the Clayton Act. We're suing under Section
10 16, where you are only seeking injunctive relief under
11 Section 16, the standing requirement is much, much
12 lower. In fact, it drops all the way to just general
13 standing. Where if you are proximately hurt in any
14 way -- you don't have to be a market participant.

15 The cases you were just referencing are
16 cases where the courts say, if you are going to sue for
17 treble damages, you have to be a participant in the
18 market in which you are seeking damages. And there are
19 cases that go down that road, but one also has to look
20 carefully at what the Supreme Court has said, especially
21 in this context of Section 16, and in Section 4, which
22 is more applicable to the Seawater case. And I will get
23 into that in terms of the McCready case when we are
24 arguing that case.

25 But it's really important to recognize that

1 all we have to do is show a potential impact on leasing
2 quota share, a potential to have the -- as professor or
3 Dr. Radtke says, concentration and lower prices in one
4 of the six markets, if we are locked into that
5 six-market notion, will negatively impact markets to the
6 south. That is enough if all you are seeking is
7 injunctive relief. And there's no question about that,
8 given the way the cases --

9 THE COURT: How is that different than the
10 umbrella theory, which -- I mean, there's still a
11 question of whether it's applicable to injunctive
12 relief.

13 MR. HAGLUND: Umbrella theory is one that
14 goes to damages. And that's one of the issues we had in
15 Whaley. The umbrella theory is that if competitors are
16 conspiring -- or in the Whaley case, the theory was that
17 Pacific is setting the price. Everybody else is
18 following. They have driven the prices down and they
19 are responsible to all fishermen, regardless of who they
20 deliver to, for that price suppression. That was going
21 to be a major issue on appeal had the case not settled.

22 But the umbrella is that -- the umbrella
23 was Pacific's price setting, allegedly. And regardless
24 of whether you are delivering to Pacific or somebody
25 else, they are responsible for the umbrella of impact

1 that they have. The umbrella issue has no relevance
2 here whatsoever, because we're not -- we are only
3 seeking to enjoin an illegal acquisition that could
4 impact the industry generally, which we -- our clients
5 participate in. So the umbrella theory is not
6 applicable in this instance.

7 Now, even if -- the other point I would
8 like to make is that even if we're locked into this
9 six-market notion, which I don't think we are because --

10 THE COURT: They are locking you in, but I
11 am looking at the language in my order: New expert
12 witness may not testify in any manner that is contrary
13 to, or inconsistent with, Dr. Radtke's disclosure.

14 It does seem like you are trying to
15 bootstrap his disclosure into really having a new expert
16 testify about a whole new set of markets. You did tell
17 me there wasn't any problem with Dr. Radtke when he put
18 together the report. The question is whether he was
19 able to defend his report, if he had the mental acuity
20 to do it, and he said he did not. And now it appears
21 you are going beyond using your new expert to defend
22 your expert disclosure. He's doing his own work and
23 he's going to present an entirely different disclosure.

24 MR. HAGLUND: No. No, we don't take that
25 position. And in fact, in your order you noted that

1 Dr. Sexton was entitled to do his own work, write up his
2 report in his own way, and it just couldn't be
3 fundamentally inconsistent with Dr. Radtke's
4 conclusions.

5 And when you look at what -- at the total
6 context, which includes a declaration from Dr. Radtke in
7 Whaley, a declaration by Dr. Radtke in this very case.
8 In connection with the preliminary injunction, he was
9 the key declaration. And he was saying it's a west
10 side market -- West Coast market. Here, he says it's
11 six, but they influence each other. And it's his
12 initial disclosure. He's entitled to -- he would have
13 been entitled, if he stayed in the case, to respond to
14 discovery.

15 For example, just a practical example, when
16 the disclosure was prepared and tendered to the other
17 side, the depositions of the police officers had not
18 occurred, and certain information wasn't even known to
19 us until documentation was produced after that
20 disclosure and the deposition unfolded. We learned that
21 Dennis Rankin goes significantly farther than 100 miles
22 from the place of his place of business, harvest to
23 deliver, in the wintertime when he has one of his two
24 commercial fishing vessels fishing for petrale and dover
25 sole way up near the Canadian border area, and

1 delivering into Bellingham.

2 Dr. Radtke had no market up there, based on
3 his initial report. That was one of the areas that was
4 going to have to be addressed in his review of what
5 comes out in discovery.

6 We have to have some play in the works
7 associated with the fact that it was an initial
8 disclosure, subject to change based upon clarification,
9 based upon ongoing discovery, and what the defense
10 experts come up with.

11 So I think you are going to be able to
12 assess, down the road, when Dr. Sexton is in a position
13 to prepare his report, to see whether or not we have
14 somehow tried to take unfair advantage of a substitution
15 that had to take place for reasons over which we had no
16 control.

17 So the other point I would like to make
18 about the -- even if we're stuck with the -- with this
19 effort to handcuff us to six markets, without
20 recognizing the qualifying points made regarding impact
21 on neighboring markets that is in Dr. Radtke's report,
22 that we have a situation here where we have got the
23 impact on the potential leasing opportunity, which
24 Dr. Sexton speaks to. You have got the changing
25 biological --

1 THE COURT: But has your client spoken to
2 it? I am having a hard time -- Rankin can go up
3 100 miles farther than you thought, but when it came to
4 Astoria, he said, I am happy where I am. Boardman said
5 he would never leave. So -- I mean, I am still trying
6 to figure out where their injury is, and maybe I am
7 having a harder time understanding the lease agreements
8 that they have, and these quotas that they have, and how
9 that fits into it. And is discovery going to show us
10 something, that there's actual injury to these folks?

11 MR. HAGLUND: I will make two points there.
12 If you look at our brief, we quote the statements by our
13 clients as to why they are pursuing this case. And the
14 reason is that they are very concerned about excess
15 concentration, and it's their view that excess
16 concentration in one area impacts them to the south or
17 to the north.

18 And I think that makes good economic sense,
19 and it's supported by what is in the record now in terms
20 of what Dr. Radtke's disclosure says. And it's
21 supported in the record now by what Dr. Sexton says
22 about leasing. And Mr. -- Fisherman Lloyd Whaley
23 pointed -- there's a detailed paragraph in our brief
24 that describes what he does in connection with leasing
25 his quota share. He can lease his -- he has whiting

1 quota shares that he leases, along with all the
2 groundfish species to other fishermen, who then fish
3 that quota. And they can -- he can lease it to anyone
4 within the West Coast-wide bounds of where that quota
5 share is valid. So that makes him necessarily impacted
6 in West Port. And that --

7 THE COURT: How does the lease work? Is he
8 leasing on a flat fee or on their catch?

9 MR. HAGLUND: Basically what happens is
10 they lease on a value per pound. So if you lease 10,000
11 pounds of your 180,000 pounds of quota share in a given
12 species or two, to a particular fisherman, maybe it's a
13 black cod or sable fish specialist, maybe it's a dover
14 sole, but you are -- there's an exchange. And you can
15 go through that exchange. You may find your own
16 lessees, but you basically are paying a fisherman who is
17 going to have that -- you have to assign that quota
18 share to a vessel under the NMFS system.

19 And a fisherman who then has to go out to
20 catch that has to have pounds himself, plus whatever
21 he's leased. And he can't go over that total. But it's
22 dollars per pound is how these are negotiated.

23 And if concentration in one market results
24 in a lowering of the average wholesale lease cost for
25 pounds in that particular species, that's how these two

1 plaintiffs who can lease, and one of them is leasing all
2 of it, and has been for a few years now, are impacted
3 and suffer specific anti-trust injury backed up by what
4 Professor Sexton says in his declaration.

5 The other point that I would like to make
6 on anti-trust injury, Your Honor, is that if you look at
7 the McCready case, the plaintiff, the Supreme Court
8 said, was qualified to pursue in that instance, a
9 Section 4 damages case, was not a participant in the
10 market.

11 In the McCready case, the Blue Shield
12 versus McCready case, Blue Shield conspired with the
13 Psychiatric Society of Virginia to exclude from the
14 insured segments of the medical insurance market
15 psychotherapeutic services that were rendered by
16 clinical psychologists. The participants in the
17 affected market are psychiatrists and psychologists.
18 The case wasn't brought by psychologists, it was brought
19 by a person who had insurance.

20 THE COURT: The consumer.

21 MR. HAGLUND: The consumer. And they were
22 one step removed from the market participants. And this
23 is more for Front Street in the next case, but it shows
24 that especially where you are -- you don't have to be an
25 actual participant if you are impacted.

1 THE COURT: What is the tuna fisherman case
2 where the fisherman had -- their wages are based on
3 anti-competitive --

4 MR. HAGLUND: That's the Eagle case. And
5 it's very distinguishable. This was an issue in Whaley,
6 as well, Your Honor, because the question there was
7 within the class of Whaley plaintiffs, they clearly --
8 there's no question that whoever owned the boat and was
9 selling the fish to Pacific Seafood, or other processors
10 in that case, was a qualified plaintiff.

11 The Eagle issue is whether or not the
12 captain, who is a nonowner in some instances, and the
13 crew, who -- in the fishing industry everybody works on
14 a percentage of the catch basis. In other words, you
15 are a joint venturer and that was going to be the
16 argument. If you are a joint venturer getting, as the
17 captain, say, 40 percent and the crew gets 20 percent,
18 do you qualify as a plaintiff.

19 We don't have this issue in this case.
20 Every single one of these three plaintiffs is completely
21 outside of Eagle, because they are the owners of their
22 boats. And they are the ones engaged in the sale of
23 these fish to processors on the West Coast. So Eagle is
24 a nonissue.

25 I guess, in wrapping up, Your Honor, we

1 filed this case -- these three fishermen filed this case
2 to stop Pacific Seafood from being able to achieve
3 company town status in West Port, Washington, which is
4 what will happen if they are successful in acquiring the
5 highest capacity processing plant, highest capacity
6 flash freezing and cold storage plant, and highest
7 capacity fish meal plant on the West Coast.

8 We have a significant, very recent decision
9 that we have been waiting -- we're waiting almost a year
10 to learn how it was going to turn out, and it shows that
11 our concerns are legitimate. I am referring to Judge
12 Gilliam's decision in late February on a case where
13 cross-motions for summary judgment had been pending for
14 over 11 months.

15 That's the case where Pacific Seafood
16 challenged the entire quota system, or more specifically
17 challenged the limits on aggregate quota share holdings
18 as illegal. And that case -- the opinion is
19 extraordinarily well-written. We filed it as a status
20 report in connection with the Innovation Marine case,
21 but it also has relevance here.

22 What that record revealed was that Pacific
23 Seafood in Eureka, Northern California, has, according
24 to the paperwork that we have in this -- in the patent
25 data that's part of this case, has over 90 percent, I

1 think it's 96 or 97 percent share of all of the fish
2 deliveries in that Northern California zone.

3 The record in -- and it's in Judge
4 Gilliam's opinion, they were challenging the limits on
5 how much quota share they can own on the grounds that it
6 was impinging their ability to have -- to control as
7 much of their own catch as possible.

8 And that opinion, I think on page 5, notes
9 that Pacific Seafood's plant there, called Pacific
10 Choice, has over half of its groundfish deliveries from
11 just four vessels, every one of which they own.

12 Fortunately, that case came down as we had
13 hoped. And Judge Gilliam rejected the challenges to the
14 quota share system, to the limits on it. And upheld the
15 government's -- ruled in favor of the government's --
16 that's the Magnuson Act, which includes a provision that
17 the National Marine Fisheries Service takes steps to
18 ensure that there is not excessive concentration in the
19 quota share allocations. All of that was affirmed. The
20 regulations stand in place.

21 And one of the points that we make in our
22 complaint in this case is that one of the reasons this
23 transaction should not be able to go forward is that it
24 would result in Pacific Seafood acquiring additional
25 quota share. They have had to divest down to -- by a

1 very significant share of the amount that they were over
2 these caps. They had almost five years to do that.
3 They did it just before the deadline and filed suit to
4 challenge the caps. Those have now been upheld. They
5 would move their share of the whiting harvest to over
6 21 percent if they were able to obtain the quota share
7 that comes with a purchase of Ocean Gold Seafoods.

8 At this stage of the case where they filed
9 this preemptive and premature motion for summary
10 judgment, where discovery is not yet done, where their
11 experts -- they have yet to prepare their own expert.

12 THE COURT: Not premature. I mean,
13 anti-trust injury is a threshold matter. We're going to
14 be spending a lot of money on a lot of discovery if we
15 can't determine initially if your plaintiffs are the
16 appropriate plaintiffs bringing the suit. It seems to
17 me now is a better time than later to figure that out.

18 MR. HAGLUND: And I commend you to look at
19 the cases that I have referenced here in a Section 16
20 Clayton Act injunctive-relief-only case, we are so far
21 over the bar in terms of what we have to demonstrate in
22 order to have anti-trust injury here.

23 THE COURT: Let me hear from the defense.
24 I would like the response to address anti-trust injury.
25 And not every practice that is going on in the fishing

1 industry with regard to this particular -- it seems like
2 a focus really is on whether these are the appropriate
3 plaintiffs, and I would like to focus on that if you
4 could.

5 MR. FOSTER: Your Honor, did you want me to
6 give a tiny bit of background?

7 THE COURT: If you would.

8 MR. FOSTER: Because of our audience, very
9 briefly, some things that aren't apparent from the
10 record. So one of the things, somewhat interesting
11 facts, maybe, in light of the 9th Circuit opinion, there
12 never was any substantive response on the merits to the
13 motion for preliminary injunction, because the
14 transaction had been withdrawn and terminated,
15 effectively, but yet Judge Panner went ahead and issued
16 an injunction.

17 The primary issue -- and I am giving you
18 our perspective on this. I am not really trying to
19 argue. But from our perspective, the primary issue that
20 we were raising on appeal was the issue of the
21 arbitrability of the underlying dispute, and whether the
22 parties' Settlement Agreement in the prior Whaley case
23 compelled the parties to go to an arbitration process to
24 resolve any objections to the transaction, and thereby
25 avoiding where we are today.

1 So that gives you just a little bit of a
2 procedural background that may not be apparent from the
3 record. So I will get to the heart of it now, Your
4 Honor. You are correct, the relevant market definition
5 is an absolutely threshold issue that plaintiffs need to
6 address and define early on in the case, because that
7 sets the parameters by which the economic analysis and
8 anti-trust injury are assessed.

9 The definition of the relevant market is
10 not a negotiation between competing expert reports.
11 Plaintiffs file, and basically take a position with
12 respect to the relevant market that they allege, or in
13 this case relevant markets that they allege exist.

14 In this case, there were a myriad of
15 relevant markets defined by both products and geography.
16 The three products at issue are the sale by fishermen,
17 shore side to processors of whiting -- which is a white
18 fish in great abundance, but not all that popular in the
19 US to eat -- shrimp and groundfish, trawl-caught, a
20 specific way of catching groundfish. And groundfish
21 includes a very wide range of species of fish, some more
22 valuable than others.

23 The plaintiffs, through discovery responses
24 and also in the expert report filed by their expert,
25 defined three product markets in the West Port area --

1 West Port, Washington. Again, those three products that
2 I just described, and they define the West Port market
3 as a separate, independent economic market. And they
4 also define some other markets down the coast.

5 Now, contrary to what Mr. Haglund said, and
6 perhaps he misspoke, but I thought I heard him say that
7 for a plaintiff or plaintiffs that are only seeking
8 injunctive relief in a Clayton Act claim, or a Section
9 2 claim -- in other words, only seeking relief under
10 Section 16 of the Clayton Act, all they have to prove is
11 just general standing.

12 Well, that isn't the law. The law, and the
13 Cargo case speaks to this directly, is that anti-trust
14 injury, either direct or actual or threatened, is still
15 an element of a Clayton Act claim, even when the
16 plaintiffs are only seeking injunctive relief.

17 And that injury, anti-trust injury is
18 identical, whether it's a damage case or an injunction
19 case. And in the injunction environment it simply added
20 threatened injury. But you still have to prove the
21 presence of injury or the likelihood of injury.

22 Now the 9th Circuit lays out a test -- I
23 won't bore you with reciting it here. It's in our
24 brief -- but a test and the requirements for proving
25 anti-trust injury. And as we believe we have

1 demonstrated, and frankly we didn't demonstrate it. The
2 plaintiffs demonstrated it. The plaintiffs are not
3 market participants in any of the product markets in the
4 defined economically distinct West Port, Washington,
5 market, and they haven't, obviously, been able to
6 identify any injury or threatened injury that they have
7 suffered in that market, because they are not in the
8 market.

9 THE COURT: What about the leasing issue,
10 quota options? Does that get them into the market
11 somehow?

12 MR. FOSTER: Well, Your Honor, I think what
13 that gets is they are now -- and I think you have caught
14 this. This is kind of a last-minute effort to try to
15 survive here. There's an allegation that two of the
16 plaintiffs have some quota. And the theory, I think,
17 that is being advanced is without any evidence in the
18 expert report, or anywhere else, defining what this is
19 all about, we're hearing about it for the first time
20 here, I think the theory is they own some quota.

21 And that quota, the price that they can get
22 in the quota market, which is in selling the quota to
23 somebody who wants to buy it, or leasing the quota for a
24 year or two years, that their ability to recover
25 economic benefits in the quota market will somehow be

1 adversely impacted by what is happening, or what they
2 claim will happen in the West Port product markets.

3 So let me rephrase that again. I think
4 their theory is if this merger acquisition were to go
5 forward, they believe that that will depress the price
6 for fish that is being sold shore side to processors in
7 West Port. And from there, they are claiming that there
8 is this derivative or pass-through impact of some kind
9 to what they might receive for whatever quota they have,
10 to whomever they might lease it, wherever that quota
11 might actually be used.

12 So my -- I apologize for that, that's a
13 little long-winded. But our response to that is that is
14 at best some derivative injury. It is certainly a
15 speculative injury, and it is not an injury that they
16 have produced any evidence of, described in any detail.
17 Most of what you heard today is not in the record when
18 Mr. Haglund was describing about this whole leasing
19 thing.

20 And if you recall some of the testimony in
21 the record from the plaintiffs, I think one of them --
22 it might have been Mr. Whaley, said, I got such little
23 quota, I really didn't pay any attention to it. It's of
24 no importance to me.

25 So none of them deliver to West Port. None

1 of them indicated any desire to deliver to West Port --
2 excuse me. There was, I believe, Mr. Boardman at the
3 preliminary injunction stage suggested that maybe he
4 might want to go to West Port, and that he had plans to
5 do something about going to West Port, but we know that
6 never happened. And we know, based on their testimony,
7 not only did that never happen, but that these three
8 fishermen, the only fishermen remaining in the case,
9 have -- I will call it committed relationships with
10 specific processors.

11 One of the plaintiffs said, if Bornstein's
12 went out of business or stopped buying from me, I would
13 stop fishing and sell my boat. The others sell to
14 Hallmark, or VC Fisheries. And they indicated great
15 loyalty. And, I mean, I understand that. You have a
16 relationship with a processor. You feel they have
17 treated you well. You have a long-term business
18 relationship, and you work that relationship over the
19 long haul, and you fish for those processors.

20 But that certainly refutes any suggestion
21 that they are likely entrants, planning to enter the
22 West Port product markets that they defined.

23 Now Mr. Haglund mentioned the McCready
24 case. And I think it's worth chatting about for a
25 little bit, with the Court's indulgence.

1 THE COURT: These are the psychological
2 services?

3 MR. FOSTER: It's the psychotherapy
4 services case. It's the consumer, or the beneficiary
5 under the health insurance plan who wanted to use
6 psychologists for her psychotherapy treatment. The
7 allegation was that the insurance company and
8 psychiatrists had conspired together to exclude
9 psychologists.

10 And contrary to the suggestion that
11 Mr. Haglund, I think, advanced, the plaintiff in that
12 case was a participant in the market. She was a
13 consumer of psychotherapy services. And if that is in
14 any way in doubt in the language of the McCready case, a
15 year later in the Associated General Contractors case,
16 the Supreme Court talked about McCready.

17 And they made it very clear that she was in
18 the market for those services. She was a market
19 participant directly harmed by the defendant's unlawful
20 conduct.

21 There's some language in McCready that the
22 plaintiff speaks to in passing in its briefing, although
23 I didn't really hear Mr. Haglund talk much about it
24 today. But I would like to address it, because I think
25 it's, at least maybe on the Court's mind. And it's this

1 language from McCready about inextricably intertwined.
2 I don't think any court -- and I don't think the Supreme
3 Court suggested in that language, that that is a sliding
4 door to open up anti-trust litigation to anyone who has
5 an interest in fisheries, likes fish, went on a boat
6 once.

7 The way that has worked out in terms of how
8 anti-trust injury has worked out in the courts is if you
9 are not a market participant, and you are not, like
10 McCready, a consumer of the services within the market
11 that is in dispute -- there have been a couple of cases
12 which the court, I am sure has seen, because we have
13 cited them, where courts have granted anti-trust
14 standing to very particular plaintiffs. They are the
15 plaintiffs who have been used by the wrong-doers to
16 accomplish their ill deeds, if you will, in the relevant
17 market.

18 So you will remember the case involving the
19 employee who refused to execute the conspiracy to fix
20 prices. What the Court found there was that he was a
21 necessary instrument to accomplish the conspiracy, the
22 effect of the conspiracy. He was the tool by which the
23 conspirators were beating the competitors over the head.
24 And in that rare case the Court found anti-trust
25 standing for that individual because the means by which

1 the anti-trust wrongdoing was accomplished. He was
2 the -- I am trying to remember, there's some colorful
3 language in some of the cases. But, effectively, he's
4 the fulcrum, or the device, the means by which -- the
5 necessary means by which the conspirators in those cases
6 were able to accomplish the results they were seeking to
7 accomplish, directed to competitors and others in the
8 relevant market.

9 So, I mean, Your Honor, I think that fairly
10 summarizes what we think the state of the law is with
11 respect to anti-trust injury for a Section 16 type
12 plaintiff, seeking injunctive relief only.

13 THE COURT: What about an argument that --
14 Mr. Haglund's fall-back argument is, okay, maybe these
15 plaintiffs haven't been participating in this particular
16 market, but they participate in other markets. And by
17 suppressing prices with this acquisition of the West
18 Port market, it will necessarily result in suppression
19 of prices along other markets on the West Coast?

20 MR. FOSTER: There's a couple of problems
21 with that. One is an economic problem. They have
22 alleged independent, separate economic markets. By
23 definition, those markets are unrelated to each other
24 from pricing influences. They are separate economic
25 markets, separate participants, separate pricing demand

1 and functions. So it goes counter to the very notion of
2 separate and distinct relevant markets to turn around
3 and say, oh, yeah, but those relevant markets influence
4 each other from a price perspective. That is how one
5 normally goes about defining a relevant market is
6 through the price effects within a given geography to
7 determine whether or not you have the normal supply and
8 demand and elasticity, and all the other economic
9 analysis that goes on to define that distinct economic
10 market.

11 So No. 1, they have a problem on the
12 economics. No. 2, that kind of derivative impact has
13 been held not to be within the scope of anti-trust
14 injury; that it is not a direct impact, because of the
15 speculative nature, to some extent, the difficulties of
16 trying to determine --

17 THE COURT: The response there is, well,
18 that's in the damage context, but we're looking for
19 injunctive relief.

20 MR. FOSTER: It's the same for injunctive
21 relief, Your Honor. It's not any different than that,
22 if it has to do with causation and the approximate
23 nature of the injury. Within the distinct relevant
24 market you can assess direct injury to the participants
25 in those markets.

1 When you talk about some markets, two or
2 three and there are multiple markets down the road, then
3 you are getting into this derivative impact that has not
4 been found to be within the scope of anti-trust injury
5 with the way the cases have analyzed them.

6 THE COURT: Thank you. Mr. Haglund --

7 MR. FOSTER: Your Honor, I would cite you
8 to the American Ad Management case, which I think that
9 very point is addressed.

10 MR. HAGLUND: Couple of quick points in
11 response, Your Honor.

12 Mr. Foster is just not correct when he says
13 that this leasing issue is something that we're putting
14 in -- putting before you today. On page 7 of our brief
15 we -- and Lloyd Whaley has a declaration we submitted in
16 response to the motion for summary judgment, is --
17 they're excerpts of his deposition -- it's not a small
18 amount.

19 He's earning an average of \$110,000 a year
20 leasing his Federal quota share. And we have this issue
21 covered directly in paragraph 13 of the Sexton
22 declaration, also submitted at that time, where he says,
23 and I quote, To the extent market concentration within
24 the processing sector on the West Coast results in
25 suppression of ex vessel prices for Pacific whiting and

1 trawl-caught groundfish, there is no question the value
2 of leasing quota for these same species will be reduced.
3 So there's market participant status, even if we're
4 locked into the six separate and distinct markets, as
5 Mr. Foster emphasizes.

6 But the bottom line is, we're not through
7 discovery yet, Your Honor. The Pac Fish unavailability,
8 which still hasn't happened, blew up the schedule, as
9 you know. It would be inconsistent with fundamental
10 fairness here for us to not get the chance to continue
11 with the balance of discovery, finalize our expert
12 reports, and then let you consider whether or not we
13 failed to meet anti-trust injury.

14 On this record, summary judgment can't be
15 granted because we have these factual disputes related
16 to the leasing that is a coast-wide, including West
17 Port, situation. But the case is still, in terms of
18 discovery, relatively young. And we need the
19 opportunity to fully define these markets as precisely
20 as happens when you get the chance to have this
21 back-and-forth, the advocacy system --

22 THE COURT: Haven't you been defining the
23 markets since the Whaley case? Is it substantially
24 different? Aren't we talking about the same
25 acquisition? How much more discovery and litigation --

1 MR. HAGLUND: Whaley was completely West
2 Coast. The markets were defined as the West Coast in
3 Whaley. And that's what Dr. Radtke put in his
4 declaration in this case. They are claiming that we
5 have defined it clearly and cleanly as six separate
6 markets, and that's not really correct, because although
7 he says that, that's -- he says, Within the West Coast
8 there are these six port cluster dominant markets. But
9 on another page he references the fact that they impact
10 each other.

11 Mr. Foster is right that the way the law
12 works, you have got to have separate -- you can't have
13 interactions between them. This is a clarification that
14 will need to be made down the road, consistent with the
15 discovery. What is happening here is Pacific is trying
16 to exploit -- they saw -- this is very unusual. I have
17 never seen a situation, Your Honor, where defense
18 counsel asks to take your expert's deposition after
19 their first report, and before they issue their report.

20 This has been done because they saw an
21 opportunity, given what the case law says, on separate
22 and distinct. You can only look at each one separately.
23 But that's not the totality of what Dr. Radtke says, and
24 it's inconsistent with the record that he has in his
25 first declaration in this very case.

1 With the substitution that has occurred, we
2 can't veer significantly away from what he said, but we
3 have -- we need to have the opportunity, with the
4 benefit of discovery and the benefit of what their
5 experts are going to say, to get our final report done.
6 It's only then that you will be in a position to really
7 assess this anti-trust injury issue. Thank you.

8 MR. FOSTER: Your Honor, may I --

9 THE COURT: Let me ask you a question,
10 Mr. Foster. You know, if I rule today, I don't let them
11 reopen discovery, and let's say I grant your motion, in
12 terms of litigation strategy, don't you think the 9th
13 Circuit is more likely to get hung up on the discovery
14 issue than they might on the anti-trust, and look at
15 this that the judge didn't look enough at what the
16 extent of this market was? They didn't have enough
17 information, they should have waited, and then we're
18 going to be back here?

19 MR. FOSTER: I don't. I hope that wasn't a
20 surprising answer.

21 THE COURT: Well, your prediction last time
22 on the 9th Circuit wasn't so great. And now we're
23 arguing the 9th Circuit over whether Judge Russo or
24 Judge Hogan is deciding the arbitration.

25 I guess, I am asking, is there a reason --

1 Courts like to be safe, and we like to, maybe we should
2 let discovery go, and maybe we will be exactly where we
3 are, and I am going to be unconvinced as to market
4 injury.

5 MR. FOSTER: A little history, and I know
6 you will remember this. But after Dr. Radtke's report
7 was served, we asked the Court to compel the plaintiffs
8 to respond to discovery, which asked them to define
9 these markets. And they did so, only after you ordered
10 them to do that. And these are the markets that they
11 defined, and we are now litigating. And those are the
12 markets that I believe your order with respect to
13 substitution means that those are the markets that we
14 are litigating.

15 What Mr. Haglund apparently would like to
16 do, and you get a sense of it, he would like a do-over.
17 And the Court hasn't allowed him to do that. So I don't
18 think any more discovery is needed, because the
19 plaintiffs have defined their markets, and those are
20 what we're litigating.

21 With respect to an anti-trust injury, I
22 have to say I am a bit perplexed, because all the things
23 that we're hearing about today is information that has
24 been exclusively within the purview of the plaintiffs:
25 We were surprised to learn that our client fishes

1 100 miles away and travels. We were surprised to learn
2 that our client has leases and may lease some quota to
3 people.

4 All of this information has been in the
5 control of the plaintiffs. There's nothing here that
6 has been withheld from them. And by the way, Your
7 Honor, you may recall on this leasing issue, we had a
8 big discovery fight. I am trying to remember when it
9 was, but it was awhile ago. And we asked for production
10 of the plaintiff's leasing quota information, and
11 Mr. Haglund said that is absolutely irrelevant. And our
12 request for that discovery was denied.

13 THE COURT: Right. I do remember that now
14 that you have reminded me. I think I found it was not
15 necessarily --

16 MR. FOSTER: None of these details are in
17 the record. All of them should have been available to
18 Mr. Radtke. None of them are in his report. There's
19 nothing in the interrogatory responses that speak to any
20 of these issues.

21 So I think this record is -- this has been
22 expensive to date, Your Honor. No doubt about it. And
23 there's nothing more that is going to be developed in
24 this record, I think, that would assist you in
25 understanding whether or not these plaintiffs are

1 participants in the marketplace. And they clearly
2 aren't, based on their own testimony, and very detailed
3 testimony at that. Thank you.

4 THE COURT: Thank you both. I appreciate
5 it. I will -- I am hoping on all of these cases to get
6 decisions really relatively quickly. So maybe within
7 days, some may take a week or two.

8 All right. Which case are we going to move
9 to next? And if people need to take a break in between,
10 that's perfectly fine.

11 Mr. Haglund.

12 MR. FOSTER: I will move to the back of the
13 courtroom.

14 (END OF PROCEEDINGS AT 3:06 P.M.)
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1 STATE OF OREGON)
2) ss
3 COUNTY OF YAMHILL)

4
5 I, Deborah L. Cook, RPR, Certified Shorthand
6 Reporter in and for the State of Oregon, hereby
7 certify that at said time and place I reported in
8 stenotype all testimony adduced and other oral
9 proceedings had in the foregoing hearing; that
10 thereafter my notes were transcribed by computer-aided
11 transcription by me personally; and that the foregoing
12 transcript contains a full, true and correct record of
13 such testimony adduced and other oral proceedings had,
14 and of the whole thereof.

15 Witness my hand and seal at Dundee, Oregon,
16 this 1st day of April, 2018.

17
18 /s/ Deborah L. Cook

19 _____
20 DEBORAH L. COOK, RPR
21 Certified Shorthand Reporter
22 OREGON CSR #04-0389
23 CALIFORNIA CSR #12886
24 WASHINGTON CSR #2992
25

#	7	31:11	39:21	background [2] - 25:6, 26:2
#1777 [1] - 2:4	7 [2] - 27:8, 35:14 760 [1] - 2:10	advantage [1] - 17:14 adversely [1] - 29:1 advocacy [1] - 36:21 affected [1] - 20:17 affiliated [1] - 4:20 affiliates [1] - 7:14 affirmed [2] - 6:19, 23:19 afternoon [1] - 3:5 aggregate [1] - 22:17 ago [2] - 7:9, 40:9 Agreement [1] - 25:22 agreements [1] - 18:7 ahead [2] - 3:5, 25:15 al [2] - 3:11, 3:12 allegation [2] - 28:15, 31:7 allegations [1] - 8:12 allege [2] - 26:12, 26:13 alleged [1] - 33:22 allegedly [1] - 14:23 allocations [1] - 23:19 allowed [1] - 39:17 almost [2] - 22:9, 24:2 American [1] - 35:8 amicus [1] - 13:1 amount [2] - 24:1, 35:18 analysis [2] - 26:7, 34:9 analyzed [1] - 35:5 answer [1] - 38:20 anti [30] - 8:16, 8:20, 9:24, 10:1, 10:14, 12:20, 13:5, 20:3, 20:6, 21:3, 24:13, 24:22, 24:24, 26:8, 27:13, 27:17, 27:25, 32:4, 32:8, 32:13, 32:24, 33:1, 33:11, 34:13, 35:4, 36:13, 38:7, 38:14, 39:21 Anti [1] - 3:25 anti-competitive [1] - 21:3 anti-trust [29] - 8:16, 8:20, 9:24, 10:1, 10:14, 12:20, 13:5, 20:3, 20:6, 24:13, 24:22, 24:24, 26:8, 27:13, 27:17, 27:25, 32:4, 32:8, 32:13, 32:24, 33:1, 33:11, 34:13, 35:4, 36:13, 38:7, 38:14,	Anti-Trust [1] - 3:25 apologize [1] - 29:12 apparent [2] - 25:9, 26:2 appeal [2] - 14:21, 25:20 appealed [1] - 6:14 applicable [3] - 13:22, 14:11, 15:6 appreciate [1] - 41:4 appropriate [2] - 24:16, 25:2 approximate [1] - 34:22 April [1] - 3:2 arbitrability [1] - 25:21 arbitration [2] - 25:23, 38:24 area [3] - 16:25, 18:16, 26:25 areas [2] - 11:2, 17:3 argue [1] - 25:19 argued [1] - 6:14 arguing [2] - 13:24, 38:23 argument [7] - 3:12, 4:3, 4:7, 7:3, 21:16, 33:13, 33:14 arose [1] - 4:12 assess [3] - 17:12, 34:24, 38:7 assessed [1] - 26:8 assign [1] - 19:17 assist [1] - 40:24 associate [1] - 3:17 Associated [1] - 31:15 associated [1] - 17:7 Astoria [1] - 18:4 AT [1] - 41:14 attempting [1] - 7:17 attention [1] - 29:23 attorneys [1] - 3:13 audience [1] - 25:8 available [1] - 40:17 Avenue [1] - 2:10 average [2] - 19:24, 35:19 avoiding [1] - 25:25 awhile [1] - 40:9	back-and-forth [1] - 36:21 backed [1] - 20:3
\$	9			
\$110,000 [1] - 35:19	90 [1] - 22:25 96 [1] - 23:1 97 [1] - 23:1 97201 [1] - 2:5 97205 [1] - 2:10 9th [10] - 2:10, 5:21, 6:14, 6:16, 6:18, 25:11, 27:22, 38:12, 38:22, 38:23			
'	A			
'15 [1] - 9:5	ability [2] - 23:6, 28:24 able [7] - 15:19, 17:11, 22:2, 23:23, 24:6, 28:5, 33:6 abound [1] - 11:4 absolutely [2] - 26:5, 40:11 abundance [4] - 11:18, 11:25, 12:9, 26:18 accomplish [4] - 32:16, 32:21, 33:6, 33:7 accomplished [1] - 33:1 according [1] - 22:23 accounts [1] - 5:25 achieve [1] - 22:2 acquire [1] - 4:16 acquiring [3] - 5:7, 22:4, 23:24 acquisition [4] - 15:3, 29:4, 33:17, 36:25 Act [6] - 13:9, 23:16, 24:20, 27:8, 27:10, 27:15 activity [1] - 12:18 actual [4] - 10:9, 18:10, 20:25, 27:14 acuity [1] - 15:19 Ad [1] - 35:8 added [1] - 27:19 additional [3] - 5:5, 13:4, 23:24 address [5] - 7:3, 7:7, 24:24, 26:6, 31:24 addressed [2] - 17:4, 35:9 advanced [2] - 28:17,			
1				
1 [2] - 3:2, 34:11 10,000 [1] - 19:10 100 [3] - 16:21, 18:3, 40:1 11 [1] - 22:14 13 [1] - 35:21 15-00108 [1] - 3:11 16 [6] - 13:10, 13:11, 13:21, 24:19, 27:10, 33:11 180,000 [1] - 19:11				
2				
2 [2] - 27:9, 34:12 20 [2] - 8:9, 21:17 200 [1] - 2:4 2015 [3] - 4:12, 5:25, 13:3 2018 [1] - 3:2 21 [1] - 24:6 23rd [1] - 5:25 2:06 [1] - 3:2				
3				
3000 [1] - 2:10 30th [2] - 9:1, 9:8 37 [1] - 9:10 3:06 [1] - 41:14				
4				
4 [3] - 13:8, 13:21, 20:9 40 [1] - 21:17				
5				
5 [1] - 23:8 50-page [1] - 9:10 503.225.0777 [1] - 2:5 503.294.9453 [1] - 2:11				
			B	
			back-and-forth [1] - 36:21 backed [1] - 20:3	

<p>bringing [1] - 24:16 broad [1] - 6:19 brought [2] - 20:18 business [3] - 16:22, 30:12, 30:17 buy [1] - 28:23 buying [1] - 30:12</p>	<p>Central [2] - 12:1 certain [1] - 16:18 certainly [3] - 12:17, 29:14, 30:20 cetera [1] - 4:22 challenge [2] - 6:4, 24:4 challenged [2] - 22:16, 22:17 challenges [1] - 23:13 challenging [1] - 23:4 chance [2] - 36:10, 36:20 change [2] - 10:10, 17:8 changes [2] - 11:17, 11:24 changing [1] - 17:24 charge [2] - 7:6, 7:16 charged [1] - 7:5 chatting [1] - 30:24 Choice [1] - 23:10 cinema [1] - 12:15 Circuit [9] - 5:21, 6:14, 6:16, 6:18, 25:11, 27:22, 38:13, 38:22, 38:23 cite [2] - 12:2, 35:7 cited [1] - 32:13 civil [1] - 3:10 claim [5] - 12:24, 27:8, 27:9, 27:15, 29:2 claiming [2] - 29:7, 37:4 claims [1] - 4:6 clarification [3] - 10:10, 17:8, 37:13 clarified [1] - 6:25 class [3] - 5:3, 8:2, 21:7 Class [1] - 3:25 Clayton [5] - 13:9, 24:20, 27:8, 27:10, 27:15 cleanly [1] - 37:5 clear [1] - 31:17 clearly [3] - 21:7, 37:5, 41:1 CLERK [1] - 3:7 clerks [1] - 3:23 client [4] - 4:14, 18:1, 39:25, 40:2 clients [4] - 5:2, 5:5, 15:4, 18:13 clinical [1] - 20:16 close [2] - 5:19, 5:24</p>	<p>cluster [3] - 9:13, 11:20, 37:8 clusters [1] - 9:12 coast [3] - 12:2, 27:4, 36:16 Coast [14] - 4:19, 9:2, 9:5, 11:3, 11:10, 16:10, 19:4, 21:23, 22:7, 33:19, 35:24, 37:2, 37:7 coast-wide [1] - 36:16 Coast-wide [1] - 19:4 coastal [1] - 9:17 cod [1] - 19:13 cold [2] - 4:24, 22:6 Cold [1] - 4:25 colluding [1] - 7:13 collusion [2] - 7:18, 8:12 colorful [1] - 33:2 commend [1] - 24:18 comment [1] - 10:11 commercial [1] - 16:24 commit [1] - 7:17 committed [1] - 30:9 communities [1] - 9:17 companies [2] - 4:17, 4:20 company [4] - 4:25, 7:14, 22:3, 31:7 compel [1] - 39:7 compelled [1] - 25:23 competing [2] - 6:7, 26:10 competition [1] - 8:19 competitive [1] - 21:3 competitors [3] - 14:15, 32:23, 33:7 complaint [1] - 23:22 completely [3] - 7:23, 21:20, 37:1 complex [2] - 9:24 comprehensive [1] - 6:18 concede [1] - 10:19 conceding [1] - 10:15 concentrating [1] - 12:1 concentration [10] - 5:6, 11:8, 11:15, 13:4, 14:3, 18:15, 18:16, 19:23, 23:18, 35:23 concerned [1] - 18:14 concerns [2] - 5:5, 22:11 conclusions [1] - 16:4 conduct [1] - 31:20</p>	<p>confirmed [1] - 5:21 connection [3] - 16:8, 18:24, 22:20 consider [1] - 36:12 consistent [1] - 37:14 conspiracy [3] - 32:19, 32:21, 32:22 conspirators [2] - 32:23, 33:5 conspired [2] - 20:12, 31:8 conspiring [1] - 14:16 consumer [5] - 20:20, 20:21, 31:4, 31:13, 32:10 contacted [1] - 5:2 contend [1] - 7:10 context [3] - 13:21, 16:6, 34:18 continue [1] - 36:10 Contractors [1] - 31:15 contrary [3] - 15:12, 27:5, 31:10 control [4] - 12:16, 17:16, 23:6, 40:5 correct [3] - 26:4, 35:12, 37:6 cost [1] - 19:24 counsel [5] - 3:14, 4:13, 5:20, 5:22, 37:18 counter [1] - 34:1 counterclaims [2] - 8:13, 8:14 couple [3] - 32:11, 33:20, 35:10 COURT [28] - 3:4, 3:7, 3:13, 3:18, 3:22, 5:11, 8:4, 10:13, 12:13, 14:9, 15:10, 18:1, 19:7, 20:20, 21:1, 24:12, 24:23, 25:7, 28:9, 31:1, 33:13, 34:17, 35:6, 36:22, 38:9, 38:21, 40:13, 41:4 court [3] - 7:25, 32:2, 32:12 Court [10] - 3:7, 7:17, 13:20, 20:7, 31:16, 32:3, 32:20, 32:24, 39:7, 39:17 Court's [2] - 30:25, 31:25 courtroom [1] - 41:13 courts [3] - 13:16, 32:8, 32:13 Courts [1] - 39:1</p>	<p>covered [1] - 35:21 crew [2] - 21:13, 21:17 cross [1] - 22:13 cross-motions [1] - 22:13</p>
<p>C</p> <p>California [4] - 11:5, 11:20, 22:23, 23:2 Canadian [3] - 9:6, 11:6, 16:25 capacity [4] - 4:24, 22:5, 22:7 caps [2] - 24:2, 24:4 captain [2] - 21:12, 21:17 carefully [1] - 13:20 Cargo [1] - 27:13 Carroll [1] - 7:22 case [79] - 3:6, 3:10, 4:8, 4:12, 5:3, 5:9, 5:12, 6:15, 6:20, 7:6, 7:11, 7:12, 7:20, 8:1, 8:2, 8:6, 8:23, 9:3, 9:4, 9:24, 10:2, 10:24, 12:14, 12:20, 12:24, 13:1, 13:22, 13:23, 13:24, 14:16, 14:21, 16:7, 16:13, 18:13, 20:7, 20:9, 20:11, 20:12, 20:18, 20:23, 21:1, 21:4, 21:10, 21:19, 22:1, 22:12, 22:15, 22:18, 22:20, 22:25, 23:12, 23:22, 24:8, 24:20, 25:22, 26:6, 26:13, 26:14, 27:13, 27:18, 27:19, 30:8, 30:24, 31:4, 31:12, 31:14, 31:15, 32:18, 32:24, 35:8, 36:17, 36:23, 37:4, 37:21, 37:25, 41:8 cases [11] - 3:24, 13:15, 13:16, 13:19, 14:8, 24:19, 32:11, 33:3, 33:5, 35:5, 41:5 catch [4] - 19:8, 19:20, 21:14, 23:7 catching [1] - 26:20 caught [5] - 11:23, 12:4, 26:19, 28:13, 36:1 causation [1] - 34:22 causing [1] - 12:19</p>				<p>D</p> <p>damage [2] - 27:18, 34:18 damages [6] - 12:25, 13:9, 13:17, 13:18, 14:14, 20:9 data [1] - 22:25 date [1] - 40:22 days [2] - 7:4, 41:7 dead [1] - 5:10 deadline [1] - 24:3 deciding [1] - 38:24 decision [2] - 22:8, 22:12 decisions [1] - 41:6 declaration [12] - 7:19, 7:21, 9:4, 16:6, 16:7, 16:9, 20:4, 35:15, 35:22, 37:4, 37:25 declarations [1] - 9:2 deeds [1] - 32:16 defend [2] - 15:19, 15:21 Defendant [1] - 2:7 defendant [1] - 10:4 defendant's [1] - 31:19 defense [3] - 17:9, 24:23, 37:17 define [6] - 26:6, 27:2, 27:4, 34:9, 36:19, 39:8 defined [8] - 26:15, 26:25, 28:4, 30:22, 37:2, 37:5, 39:11, 39:19 defining [3] - 28:18, 34:5, 36:22 definition [4] - 9:23, 26:4, 26:9, 33:23 deliver [6] - 12:7, 12:11, 14:20, 16:23, 29:25, 30:1 delivered [2] - 11:23, 12:10 deliveries [2] - 23:2, 23:10 delivering [2] - 14:24, 17:1 demand [2] - 33:25, 34:8 demonstrate [2] -</p>

<p>24:21, 28:1 demonstrated [2] - 28:1, 28:2 denied [1] - 40:12 Dennis [2] - 10:23, 16:21 deposition [4] - 12:2, 16:20, 35:17, 37:18 depositions [1] - 16:17 depress [1] - 29:5 depressed [1] - 7:15 derivative [4] - 29:8, 29:14, 34:12, 35:3 describe [1] - 4:5 described [2] - 27:2, 29:16 describes [1] - 18:24 describing [2] - 4:4, 29:18 desire [1] - 30:1 despite [1] - 8:18 detail [1] - 29:16 detailed [2] - 18:23, 41:2 details [1] - 40:16 determine [3] - 24:15, 34:7, 34:16 detriment [1] - 9:16 developed [2] - 12:15, 40:23 device [2] - 12:16, 33:4 different [5] - 12:13, 14:9, 15:23, 34:21, 36:24 difficult [1] - 12:21 difficulties [1] - 34:15 direct [3] - 27:14, 34:14, 34:24 directed [1] - 33:7 directly [4] - 13:7, 27:13, 31:19, 35:21 disclosure [17] - 8:25, 9:7, 9:11, 9:14, 9:19, 10:3, 10:7, 11:12, 15:13, 15:15, 15:22, 15:23, 16:12, 16:16, 16:20, 17:8, 18:20 disclosures [1] - 6:24 disconnected [1] - 7:18 discovery [25] - 6:21, 8:14, 9:19, 10:11, 11:11, 16:14, 17:5, 17:9, 18:9, 24:10, 24:14, 26:23, 36:7, 36:11, 36:18, 36:25,</p>	<p>37:15, 38:4, 38:11, 38:13, 39:2, 39:8, 39:18, 40:8, 40:12 dismiss [1] - 6:8 dispute [2] - 25:21, 32:11 disputes [1] - 36:15 distinct [6] - 28:4, 34:2, 34:9, 34:23, 36:4, 37:22 distinction [1] - 13:7 distinguishable [1] - 21:5 District [2] - 3:7, 3:8 divest [1] - 23:25 do-over [1] - 39:16 dock [1] - 5:17 dock-talk [1] - 5:17 documentation [1] - 16:19 doers [1] - 32:15 dollars [1] - 19:22 dominance [2] - 9:11, 9:15 dominant [1] - 37:8 done [3] - 24:10, 37:20, 38:5 door [1] - 32:4 doubt [2] - 31:14, 40:22 dover [2] - 16:24, 19:13 down [9] - 11:22, 13:19, 14:18, 17:12, 23:12, 23:25, 27:4, 35:2, 37:14 Dr [21] - 6:24, 8:24, 10:20, 11:11, 11:19, 14:3, 15:13, 15:17, 16:1, 16:3, 16:6, 16:7, 17:2, 17:12, 17:21, 17:24, 18:20, 18:21, 37:3, 37:23, 39:6 driven [1] - 14:18 drops [1] - 13:12</p>	<p>economically [1] - 28:4 economics [2] - 10:1, 34:12 Ed [1] - 7:21 effect [1] - 32:22 effectively [3] - 7:16, 25:15, 33:3 effects [1] - 34:6 effort [2] - 17:19, 28:14 either [1] - 27:14 elasticity [1] - 34:8 element [1] - 27:15 emphasizes [1] - 36:5 employee [1] - 32:19 end [1] - 5:24 END [1] - 41:14 engaged [1] - 21:22 enjoin [1] - 15:3 ensure [1] - 23:18 enter [1] - 30:21 entire [2] - 11:3, 22:16 entirely [1] - 15:23 entirety [3] - 5:14, 6:20, 11:9 entitled [3] - 16:1, 16:12, 16:13 entrants [1] - 30:21 environment [2] - 9:17, 27:19 ERIC [1] - 2:3 Eric [1] - 3:17 especially [2] - 13:20, 20:24 et [3] - 3:11, 4:22 Eureka [3] - 11:20, 11:23, 22:23 evidence [2] - 28:17, 29:16 ex [1] - 35:25 exactly [1] - 39:2 example [3] - 11:7, 16:15 excerpts [1] - 35:17 excess [2] - 18:14, 18:15 excessive [1] - 23:18 exchange [2] - 19:14, 19:15 exclude [2] - 20:13, 31:8 exclusively [1] - 39:24 excuse [1] - 30:2 execute [1] - 32:19 exist [1] - 26:13 exists [1] - 5:18</p>	<p>expensive [1] - 40:22 experience [1] - 9:23 expert [19] - 6:23, 6:24, 8:24, 9:7, 9:20, 10:3, 10:7, 15:11, 15:15, 15:21, 15:22, 24:11, 26:10, 26:24, 28:18, 36:11 expert's [1] - 37:18 experts [3] - 17:10, 24:11, 38:5 explain [1] - 8:22 exploit [1] - 37:16 extent [3] - 34:15, 35:23, 38:16 extraordinarily [1] - 22:19 extraordinary [1] - 7:23</p>	<p>fine [1] - 41:10 firm [2] - 7:6, 7:13 first [3] - 28:19, 37:19, 37:25 fish [16] - 4:21, 4:22, 4:23, 8:7, 11:2, 19:2, 19:13, 21:9, 21:23, 22:7, 23:1, 26:18, 26:21, 29:6, 30:19, 32:5 Fish [1] - 36:7 Fisheries [3] - 10:25, 23:17, 30:14 fisheries [1] - 32:5 Fisherman [1] - 18:22 fisherman [6] - 11:25, 19:12, 19:16, 19:19, 21:1, 21:2 fishermen [9] - 5:4, 9:16, 10:23, 14:19, 19:2, 22:1, 26:16, 30:8 fishes [1] - 39:25 Fishing [1] - 11:1 fishing [6] - 8:19, 16:24, 21:13, 24:25, 30:13 fits [1] - 18:9 five [3] - 5:3, 11:22, 24:2 fix [1] - 32:19 flash [2] - 4:24, 22:6 flat [1] - 19:8 focus [2] - 25:2, 25:3 folks [3] - 3:5, 8:20, 18:10 following [1] - 14:18 force [1] - 7:13 Fort [1] - 9:6 forth [1] - 36:21 fortunately [1] - 23:12 forward [2] - 23:23, 29:5 Foster [1] - 3:19 FOSTER [14] - 2:8, 3:19, 25:5, 25:8, 28:12, 31:3, 33:20, 34:20, 35:7, 38:8, 38:19, 39:5, 40:16, 41:12 foster [4] - 35:12, 36:5, 37:11, 38:10 four [3] - 8:2, 11:21, 23:11 frankly [2] - 8:5, 28:1 fraud [1] - 7:17 freezing [2] - 4:24, 22:6 Friday [2] - 5:25, 7:21</p>
F				
<p>facilities [2] - 5:13, 5:15 facility [1] - 4:24 fact [5] - 6:23, 13:12, 15:25, 17:7, 37:9 facts [1] - 25:11 factual [1] - 36:15 failed [1] - 36:13 fairly [2] - 5:17, 33:9 fairness [1] - 36:10 faith [1] - 8:18 fall [1] - 33:14 fall-back [1] - 33:14 far [2] - 11:22, 24:20 favor [1] - 23:15 February [2] - 9:4, 22:12 Federal [1] - 35:20 Federally [3] - 10:24, 11:4, 11:8 fee [1] - 19:8 few [1] - 20:2 field [1] - 10:1 fight [1] - 40:8 figure [2] - 18:6, 24:17 file [2] - 6:3, 26:11 filed [12] - 6:7, 7:9, 7:19, 8:25, 9:8, 13:1, 22:1, 22:19, 24:3, 24:8, 26:24 filing [1] - 10:5 filings [1] - 10:9 final [2] - 10:7, 38:5 finalize [1] - 36:11</p>				
E				
<p>Eagle [4] - 21:4, 21:11, 21:21, 21:23 early [1] - 26:6 earning [1] - 35:19 eat [1] - 26:19 economic [9] - 18:18, 26:7, 27:3, 28:25, 33:21, 33:22, 33:24, 34:8, 34:9</p>				

<p>Front [1] - 20:23 fulcrum [1] - 33:4 fully [1] - 36:19 functions [1] - 34:1 fundamental [1] - 36:9 fundamentally [1] - 16:3 future [5] - 11:25, 12:12, 12:17, 12:18, 12:22</p>	<p>3:16, 3:18, 4:10, 27:5, 29:18, 30:23, 31:11, 31:23, 35:6, 39:15, 40:11, 41:11 Haglund's [1] - 33:14 half [2] - 11:5, 23:10 Hallmark [1] - 30:14 handcuff [1] - 17:19 handle [1] - 10:2 Hans [1] - 6:24 happy [1] - 18:4 hard [1] - 18:2 harder [1] - 18:7 harmed [1] - 31:19 harvest [2] - 16:22, 24:5 haul [1] - 30:19 head [2] - 4:22, 32:23 headquartered [1] - 4:19 health [1] - 31:5 hear [2] - 24:23, 31:23 heard [3] - 6:10, 27:6, 29:17 hearing [2] - 28:19, 39:23 heart [1] - 26:3 held [1] - 34:13 helping [2] - 3:23, 8:19 highest [3] - 22:5, 22:6 himself [1] - 19:20 history [1] - 39:5 Hogan [1] - 38:24 holder [1] - 11:2 holdings [1] - 22:17 Honor [25] - 3:19, 4:11, 5:15, 6:7, 6:15, 6:20, 7:3, 9:22, 11:17, 12:24, 20:6, 21:6, 21:25, 25:5, 26:4, 28:12, 33:9, 34:21, 35:7, 35:11, 36:7, 37:17, 38:8, 40:7, 40:22 Honorable [1] - 3:9 hope [1] - 38:19 hoped [1] - 23:13 hoping [1] - 41:5 hung [1] - 38:13 hurt [1] - 13:13</p>	<p>ill [1] - 32:16 illegal [2] - 15:3, 22:18 immediate [1] - 3:20 impact [12] - 9:15, 14:1, 14:5, 14:25, 15:4, 17:20, 17:23, 29:8, 34:12, 34:14, 35:3, 37:9 impacted [5] - 11:15, 19:5, 20:2, 20:25, 29:1 impacts [1] - 18:16 impinging [1] - 23:6 importance [1] - 29:24 important [2] - 13:7, 13:25 include [1] - 4:20 included [1] - 5:2 includes [3] - 16:6, 23:16, 26:21 including [2] - 11:1, 36:16 inconsistent [4] - 15:13, 16:3, 36:9, 37:24 independent [2] - 27:3, 33:22 indicated [2] - 30:1, 30:14 Individual [1] - 10:25 individual [1] - 32:25 individualized [1] - 12:20 indulgence [1] - 30:25 industry [3] - 15:4, 21:13, 25:1 inextricably [1] - 32:1 influence [2] - 16:11, 34:3 influences [1] - 33:24 information [6] - 5:17, 16:18, 38:17, 39:23, 40:4, 40:10 initial [4] - 10:6, 16:12, 17:3, 17:7 injunction [12] - 6:9, 6:13, 6:18, 6:19, 7:1, 13:2, 16:8, 25:13, 25:16, 27:18, 27:19, 30:3 injunctive [9] - 13:10, 14:7, 14:11, 24:20, 27:8, 27:16, 33:12, 34:19, 34:20 injunctive-relief-only [1] - 24:20 injured [1] - 10:16 injury [34] - 8:16, 8:20, 10:14, 12:20, 18:6,</p>	<p>18:10, 20:3, 20:6, 24:13, 24:22, 24:24, 26:8, 27:14, 27:17, 27:20, 27:21, 27:25, 28:6, 29:14, 29:15, 32:8, 33:11, 34:14, 34:23, 34:24, 35:4, 36:13, 38:7, 39:4, 39:21 Innovation [1] - 22:20 instance [2] - 15:6, 20:8 instances [1] - 21:12 instrument [1] - 32:21 insurance [4] - 20:14, 20:19, 31:5, 31:7 insured [1] - 20:14 intentions [1] - 8:18 interactions [1] - 37:13 interest [3] - 7:12, 12:25, 32:5 interesting [1] - 25:10 interrogatory [1] - 40:19 intersection [1] - 9:25 intertwined [1] - 32:1 introduce [1] - 3:14 investigated [1] - 5:15 investments [1] - 12:21 involvement [2] - 10:21, 11:13 involving [1] - 32:18 irrelevant [1] - 40:11 issue [18] - 9:23, 14:21, 15:1, 21:5, 21:11, 21:19, 25:17, 25:19, 25:20, 26:5, 26:16, 28:9, 35:13, 35:20, 37:19, 38:7, 38:14, 40:7 issued [4] - 6:13, 10:24, 11:12, 25:15 issues [2] - 14:14, 40:20</p>	<p>38:24 judgment [4] - 22:13, 24:10, 35:16, 36:14 June [2] - 9:1, 9:8</p>
<p>G</p>				<p>K</p>
<p>General [1] - 31:15 general [2] - 13:12, 27:11 generally [1] - 15:4 generated [1] - 10:8 generates [1] - 10:3 geographic [1] - 9:9 geography [3] - 9:13, 26:15, 34:6 Gilliam [1] - 23:13 Gilliam's [2] - 22:12, 23:4 given [4] - 14:8, 19:11, 34:6, 37:21 Gold [6] - 4:16, 4:18, 5:7, 5:13, 7:14, 24:7 government's [2] - 23:15 grant [1] - 38:11 granted [2] - 32:13, 36:15 grave [1] - 5:5 great [3] - 26:18, 30:14, 38:22 groundfish [7] - 11:3, 19:2, 23:10, 26:19, 26:20, 36:1 grounds [1] - 23:5 Group [4] - 2:7, 4:14, 6:9, 7:24 guess [2] - 21:25, 38:25 guts [1] - 4:22 guy [1] - 12:15</p>				<p>KELLEY [1] - 2:3 Kelley [1] - 2:4 Kelly [1] - 3:17 key [1] - 16:9 kind [3] - 28:14, 29:8, 34:12 known [1] - 16:18</p>
				<p>L</p>
<p>HAGLUND [16] - 2:2, 3:16, 4:11, 5:14, 8:21, 10:18, 12:23, 14:13, 15:24, 18:11, 19:9, 20:21, 21:4, 24:18, 35:10, 37:1 Haglund [13] - 2:4,</p>				<p>language [6] - 15:11, 31:14, 31:21, 32:1, 32:3, 33:3 largest [3] - 4:18, 4:21, 4:23 last [5] - 7:4, 7:21, 12:5, 28:14, 38:21 last-minute [1] - 28:14 late [1] - 22:12 law [7] - 7:6, 10:1, 27:12, 33:10, 37:11, 37:21 law.com [1] - 2:6 laws [1] - 13:5 lawyers [2] - 6:1, 6:2 lays [1] - 27:22 lead [1] - 12:2 leads [1] - 6:22 learn [3] - 22:10, 39:25, 40:1 learned [2] - 5:4, 16:20 lease [10] - 18:7, 18:25, 19:3, 19:7, 19:10, 19:24, 20:1, 29:10, 40:2 leased [1] - 19:21 leases [3] - 11:7, 19:1, 40:2 leasing [16] - 11:13, 14:1, 17:23, 18:22, 18:24, 19:8, 20:1, 28:9, 28:23, 29:18, 35:13, 35:20, 36:2, 36:16, 40:7, 40:10 least [1] - 31:25 leave [1] - 18:5 Lee [1] - 3:21 LEE [1] - 2:9 left [3] - 3:20, 3:21, 8:4 legitimate [1] - 22:11</p>

<p>lengthy [1] - 4:7 lessees [1] - 19:16 level [1] - 13:3 light [1] - 25:11 likelihood [1] - 27:21 likely [2] - 30:21, 38:13 limits [3] - 22:17, 23:4, 23:14 line [1] - 36:6 litigating [3] - 39:11, 39:14, 39:20 litigation [3] - 32:4, 36:25, 38:12 Lloyd [3] - 10:23, 18:22, 35:15 LLP [2] - 2:4, 2:9 lock [1] - 8:23 locked [3] - 14:4, 15:8, 36:4 locking [1] - 15:10 long-term [1] - 30:17 long-winded [1] - 29:13 look [9] - 10:19, 13:19, 16:5, 18:12, 20:6, 24:18, 37:22, 38:14, 38:15 looking [2] - 15:11, 34:18 looks [1] - 3:22 loss [1] - 12:14 lower [2] - 13:12, 14:3 lowering [1] - 19:24 loyalty [1] - 30:15</p>	<p>33:16, 33:18, 34:5, 34:10, 34:24, 35:23, 36:3, 38:16, 39:3 Market [1] - 2:4 marketplace [1] - 41:1 markets [43] - 8:8, 8:19, 9:2, 9:9, 9:16, 10:21, 11:9, 11:13, 12:17, 12:18, 14:4, 14:5, 15:16, 17:19, 17:21, 26:13, 26:15, 26:25, 27:4, 28:3, 29:2, 30:22, 33:16, 33:19, 33:22, 33:23, 33:25, 34:2, 34:3, 34:25, 35:1, 35:2, 36:4, 36:19, 36:23, 37:2, 37:6, 37:8, 39:9, 39:10, 39:12, 39:13, 39:19 matter [2] - 10:14, 24:13 matters [1] - 8:15 McCready [10] - 13:23, 20:7, 20:11, 20:12, 30:23, 31:14, 31:16, 31:21, 32:1, 32:10 McShane [1] - 3:9 meal [3] - 4:21, 4:23, 22:7 mean [6] - 8:13, 14:10, 18:5, 24:12, 30:15, 33:9 means [4] - 32:25, 33:4, 33:5, 39:13 Medford [1] - 6:10 medical [1] - 20:14 meet [1] - 36:13 men [1] - 7:11 mental [1] - 15:19 mentioned [1] - 30:23 merger [1] - 29:4 merits [2] - 7:8, 25:12 mhaglund@hk [1] - 2:6 mhaglund@hk-law.com [1] - 2:6 Michael [2] - 3:9, 3:16 MICHAEL [2] - 2:2, 2:3 might [7] - 12:11, 29:9, 29:10, 29:11, 29:22, 30:4, 38:14 migration [1] - 11:18 Mike [1] - 3:17 miles [4] - 12:6, 16:21, 18:3, 40:1 mind [1] - 31:25 minute [1] - 28:14</p>	<p>misspoke [1] - 27:6 modification [1] - 10:10 Monday [1] - 7:10 money [1] - 24:14 months [2] - 6:14, 22:14 most [1] - 29:17 motion [8] - 3:12, 6:8, 6:9, 7:8, 24:9, 25:13, 35:16, 38:11 motions [2] - 6:7, 22:13 move [3] - 24:5, 41:8, 41:12 MR [28] - 3:16, 3:19, 4:11, 5:14, 8:21, 10:18, 12:23, 14:13, 15:24, 18:11, 19:9, 20:21, 21:4, 24:18, 25:5, 25:8, 28:12, 31:3, 33:20, 34:20, 35:7, 35:10, 37:1, 38:8, 38:19, 39:5, 40:16, 41:12 multiple [1] - 35:2 myriad [1] - 26:14</p>	<p>none [5] - 9:21, 29:25, 40:16, 40:18 nonissue [1] - 21:24 nonowner [1] - 21:12 normal [1] - 34:7 normally [1] - 34:5 north [1] - 18:17 northern [1] - 11:5 Northern [3] - 11:20, 22:23, 23:2 noted [1] - 15:25 notes [1] - 23:8 nothing [4] - 7:11, 40:5, 40:19, 40:23 notice [2] - 4:13, 5:1 notation [3] - 14:5, 15:9, 34:1 nuance [1] - 9:25 number [2] - 3:23, 10:2</p>	<p>opening [1] - 4:7 opinion [7] - 5:21, 6:19, 6:25, 22:18, 23:4, 23:8, 25:11 opportunity [5] - 11:14, 17:23, 36:19, 37:21, 38:3 options [1] - 28:10 oral [1] - 3:12 order [4] - 15:11, 15:25, 24:22, 39:12 Order [1] - 5:8 ordered [1] - 39:9 Oregon [7] - 2:5, 2:10, 3:8, 3:25, 12:1, 13:1 originated [1] - 4:12 outside [1] - 21:21 overview [1] - 4:8 own [11] - 9:20, 15:22, 16:1, 16:2, 19:15, 23:5, 23:7, 23:11, 24:11, 28:20, 41:2 owned [2] - 4:25, 21:8 owners [2] - 12:15, 21:21</p>
<p>M</p>		<p>N</p>	<p>O</p>	<p>P</p>
<p>Magnuson [1] - 23:16 major [1] - 14:21 Management [1] - 35:8 manner [1] - 15:12 March [1] - 6:12 Marine [3] - 10:25, 22:20, 23:17 market [49] - 5:6, 8:9, 9:5, 9:12, 9:15, 9:23, 10:17, 11:15, 11:21, 13:14, 13:18, 14:5, 15:9, 16:10, 17:2, 19:23, 20:10, 20:14, 20:17, 20:22, 26:4, 26:9, 26:12, 27:2, 27:3, 28:3, 28:5, 28:7, 28:8, 28:10, 28:22, 28:25, 31:12, 31:18, 32:9, 32:10, 32:17, 33:8,</p>		<p>National [2] - 10:25, 23:17 nature [2] - 34:15, 34:23 near [1] - 16:25 necessarily [3] - 19:5, 33:18, 40:15 necessary [2] - 32:21, 33:5 need [5] - 26:5, 36:18, 37:14, 38:3, 41:9 needed [1] - 39:18 negatively [1] - 14:5 negotiated [1] - 19:22 negotiating [1] - 4:15 negotiation [1] - 26:10 neighboring [1] - 17:21 never [6] - 10:11, 18:5, 25:12, 30:6, 30:7, 37:17 new [4] - 15:11, 15:15, 15:16, 15:21 Newport [1] - 12:7 next [3] - 6:5, 20:23, 41:9 nine [1] - 6:14 NMFS [1] - 19:18</p>	<p>objected [1] - 5:16 objections [1] - 25:24 obtain [1] - 24:6 obviously [2] - 4:4, 28:5 occur [1] - 5:6 occurred [2] - 16:18, 38:1 occurring [2] - 6:5, 7:12 Ocean [8] - 4:16, 4:18, 4:20, 4:25, 5:7, 5:13, 7:14, 24:7 OF [1] - 41:14 offered [1] - 7:1 officers [2] - 7:25, 16:17 old [1] - 4:3 old-school [1] - 4:3 once [1] - 32:6 one [30] - 6:1, 7:20, 8:7, 8:10, 8:15, 9:24, 11:2, 11:9, 11:19, 13:19, 14:3, 14:13, 14:14, 16:23, 17:3, 18:16, 19:23, 20:1, 20:22, 21:20, 23:11, 23:21, 23:22, 25:10, 29:21, 30:11, 33:21, 34:4, 37:22 ones [1] - 21:22 ongoing [2] - 9:19, 17:9 open [1] - 32:4</p>	<p>p.m [1] - 3:2 P.M [1] - 41:14 Pac [1] - 36:7 Pacific [25] - 2:7, 3:11, 4:13, 4:14, 5:7, 5:16, 5:20, 5:22, 6:8, 7:8, 7:24, 8:22, 9:11, 9:20, 14:17, 14:24, 21:9, 22:2, 22:15, 22:22, 23:9, 23:24, 35:25, 37:15 Pacific's [4] - 6:1, 6:2, 9:15, 14:23 page [5] - 9:10, 9:18, 23:8, 35:14, 37:9 Panner [4] - 6:6, 6:11, 6:12, 25:15 paperwork [1] - 22:24 paragraph [2] - 18:23, 35:21 parameters [1] - 26:7 part [4] - 6:8, 6:10, 7:2, 22:25 participant [8] - 13:14, 13:17, 20:9, 20:25, 31:12, 31:19, 32:9, 36:3 participants [6] - 20:16, 20:22, 28:3, 33:25, 34:24, 41:1</p>

<p>participate [2] - 15:5, 33:16</p> <p>participating [1] - 33:15</p> <p>particular [7] - 12:19, 12:20, 19:12, 19:25, 25:1, 32:14, 33:15</p> <p>parties [3] - 7:13, 7:18, 25:23</p> <p>parties' [1] - 25:22</p> <p>pass [1] - 29:8</p> <p>pass-through [1] - 29:8</p> <p>passing [1] - 31:22</p> <p>past [1] - 12:11</p> <p>patent [1] - 22:24</p> <p>pay [1] - 29:23</p> <p>paying [1] - 19:16</p> <p>pending [1] - 22:13</p> <p>people [3] - 3:22, 40:3, 41:9</p> <p>per [2] - 19:10, 19:22</p> <p>percent [5] - 21:17, 22:25, 23:1, 24:6</p> <p>percentage [1] - 21:14</p> <p>perfectly [1] - 41:10</p> <p>perhaps [1] - 27:6</p> <p>permit [1] - 12:9</p> <p>permits [1] - 10:22</p> <p>perplexed [1] - 39:22</p> <p>person [1] - 20:19</p> <p>perspective [3] - 25:18, 25:19, 34:4</p> <p>pest [1] - 12:16</p> <p>pest-control [1] - 12:16</p> <p>petrale [1] - 16:24</p> <p>place [4] - 16:22, 17:15, 23:20</p> <p>plaintiff [12] - 8:6, 10:3, 10:4, 12:3, 12:19, 20:7, 21:10, 21:18, 27:7, 31:11, 31:22, 33:12</p> <p>plaintiffs [2] - 3:14, 40:10</p> <p>plaintiffs [38] - 4:9, 7:6, 7:10, 7:19, 7:20, 8:2, 8:5, 8:7, 8:8, 8:18, 8:23, 10:16, 11:14, 20:1, 21:7, 21:20, 24:15, 24:16, 25:3, 26:5, 26:11, 26:23, 27:7, 27:16, 28:2, 28:16, 29:21, 30:11, 32:14, 32:15, 33:15,</p>	<p>39:7, 39:19, 39:24, 40:5, 40:25</p> <p>Plaintiffs [1] - 2:2</p> <p>plan [1] - 31:5</p> <p>planned [1] - 12:16</p> <p>planning [1] - 30:21</p> <p>plans [1] - 30:4</p> <p>plant [5] - 4:21, 22:5, 22:6, 22:7, 23:9</p> <p>play [1] - 17:6</p> <p>plus [1] - 19:20</p> <p>point [9] - 8:23, 12:3, 12:4, 12:23, 13:7, 15:7, 17:17, 20:5, 35:9</p> <p>pointed [1] - 18:23</p> <p>points [5] - 11:19, 17:20, 18:11, 23:21, 35:10</p> <p>police [1] - 16:17</p> <p>popular [1] - 26:18</p> <p>Port [25] - 4:19, 5:12, 8:9, 9:12, 9:15, 10:17, 12:5, 12:6, 12:10, 12:12, 19:6, 22:3, 26:25, 27:1, 27:2, 28:4, 29:2, 29:7, 29:25, 30:1, 30:4, 30:5, 30:22, 33:18, 36:17</p> <p>port [4] - 9:12, 9:13, 11:20, 37:8</p> <p>Portland [2] - 2:5, 2:10</p> <p>position [5] - 10:19, 15:25, 17:12, 26:11, 38:6</p> <p>possible [1] - 23:7</p> <p>potential [5] - 12:11, 12:14, 14:1, 14:2, 17:23</p> <p>pound [2] - 19:10, 19:22</p> <p>pounds [4] - 19:11, 19:20, 19:25</p> <p>practical [1] - 16:15</p> <p>practice [1] - 24:25</p> <p>precede [1] - 10:9</p> <p>precisely [1] - 36:19</p> <p>prediction [1] - 38:21</p> <p>preemptive [1] - 24:9</p> <p>preemptively [1] - 8:23</p> <p>preliminary [8] - 6:9, 6:13, 6:17, 6:19, 7:1, 16:8, 25:13, 30:3</p> <p>premature [2] - 24:9, 24:12</p> <p>prepare [2] - 17:13, 24:11</p> <p>prepared [1] - 16:16</p>	<p>presence [1] - 27:21</p> <p>present [1] - 15:23</p> <p>presiding [1] - 3:9</p> <p>presumptively [1] - 13:4</p> <p>pretty [2] - 6:18, 7:5</p> <p>price [8] - 7:15, 14:17, 14:20, 14:23, 28:21, 29:5, 34:4, 34:6</p> <p>prices [6] - 14:3, 14:18, 32:20, 33:17, 33:19, 35:25</p> <p>pricing [2] - 33:24, 33:25</p> <p>primary [2] - 25:17, 25:19</p> <p>problem [3] - 15:17, 33:21, 34:11</p> <p>problems [1] - 33:20</p> <p>procedural [1] - 26:2</p> <p>proceed [1] - 6:21</p> <p>proceeded [2] - 6:3, 6:16</p> <p>PROCEEDINGS [2] - 3:1, 41:14</p> <p>process [3] - 4:15, 10:12, 25:23</p> <p>processes [1] - 4:22</p> <p>processing [3] - 4:21, 22:5, 35:24</p> <p>processor [2] - 4:19, 30:16</p> <p>processors [6] - 21:9, 21:23, 26:17, 29:6, 30:10, 30:19</p> <p>produced [3] - 9:21, 16:19, 29:16</p> <p>product [5] - 4:23, 26:25, 28:3, 29:2, 30:22</p> <p>production [1] - 40:9</p> <p>products [3] - 26:15, 26:16, 27:1</p> <p>Professor [3] - 9:3, 11:12, 20:4</p> <p>professor [1] - 14:2</p> <p>Protein [1] - 4:21</p> <p>prove [2] - 27:10, 27:20</p> <p>proving [1] - 27:24</p> <p>provision [1] - 23:16</p> <p>proximately [1] - 13:13</p> <p>Psychiatric [1] - 20:13</p> <p>psychiatrists [2] - 20:17, 31:8</p> <p>psychological [1] - 31:1</p>	<p>psychologists [5] - 20:16, 20:17, 20:18, 31:6, 31:9</p> <p>psychotherapeutic [1] - 20:15</p> <p>psychotherapy [3] - 31:3, 31:6, 31:13</p> <p>purchase [1] - 24:7</p> <p>pursue [1] - 20:8</p> <p>pursuing [1] - 18:13</p> <p>purview [1] - 39:24</p> <p>put [2] - 15:17, 37:3</p> <p>putting [3] - 4:15, 35:13, 35:14</p>	<p>16:21, 18:2</p> <p>rare [1] - 32:24</p> <p>read [1] - 4:4</p> <p>reality [1] - 12:8</p> <p>really [9] - 13:25, 15:15, 25:2, 25:18, 29:23, 31:23, 37:6, 38:6, 41:6</p> <p>reason [2] - 18:14, 38:25</p> <p>reasons [3] - 11:19, 17:15, 23:22</p> <p>rebuttal [1] - 10:5</p> <p>receive [1] - 29:9</p> <p>received [2] - 4:13, 5:16</p> <p>receiving [1] - 5:1</p> <p>recent [1] - 22:8</p> <p>reciting [1] - 27:23</p> <p>recognize [1] - 13:25</p> <p>recognizing [1] - 17:20</p> <p>record [15] - 3:6, 3:15, 18:19, 18:21, 22:22, 23:3, 25:10, 26:3, 29:17, 29:21, 36:14, 37:24, 40:17, 40:21, 40:24</p> <p>recover [1] - 28:24</p> <p>reduced [1] - 36:2</p> <p>referenced [1] - 24:19</p> <p>references [1] - 37:9</p> <p>referencing [1] - 13:15</p> <p>referring [1] - 22:11</p> <p>refused [1] - 32:19</p> <p>refutes [1] - 30:20</p> <p>regard [2] - 4:8, 25:1</p> <p>regarding [1] - 17:20</p> <p>regardless [2] - 14:19, 14:23</p> <p>regulated [2] - 11:4, 11:8</p> <p>regulations [1] - 23:20</p> <p>rejected [1] - 23:13</p> <p>rejecting [1] - 7:23</p> <p>related [2] - 4:17, 36:15</p> <p>relationship [3] - 30:16, 30:18</p> <p>relationships [1] - 30:9</p> <p>relatively [2] - 36:18, 41:6</p> <p>relevance [2] - 15:1, 22:21</p> <p>relevant [13] - 9:1, 9:9, 26:4, 26:9, 26:12, 26:13, 26:15, 32:16,</p>
Q				
<p>qualified [2] - 20:8, 21:10</p> <p>qualify [1] - 21:18</p> <p>qualifying [1] - 17:20</p> <p>quick [1] - 35:10</p> <p>quickly [1] - 41:6</p> <p>quite [2] - 8:5, 10:2</p> <p>Quota [1] - 11:1</p> <p>quota [32] - 11:3, 11:8, 11:14, 14:2, 18:25, 19:1, 19:3, 19:4, 19:11, 19:17, 22:16, 22:17, 23:5, 23:14, 23:19, 23:25, 24:6, 28:10, 28:16, 28:20, 28:21, 28:22, 28:23, 28:25, 29:9, 29:10, 29:23, 35:20, 36:2, 40:2, 40:10</p> <p>quotas [1] - 18:8</p> <p>quote [2] - 18:12, 35:23</p>				
R				
<p>RACHEL [1] - 2:9</p> <p>Rachel [1] - 3:21</p> <p>radtke [1] - 15:17</p> <p>Radtke [9] - 6:25, 11:19, 14:3, 16:6, 16:7, 17:2, 37:3, 37:23, 40:18</p> <p>Radtke's [7] - 8:24, 10:20, 15:13, 16:3, 17:21, 18:20, 39:6</p> <p>raising [1] - 25:20</p> <p>RANDOLPH [1] - 2:8</p> <p>Randy [1] - 3:19</p> <p>randy.foster@stael.com [1] - 2:11</p> <p>range [1] - 26:21</p> <p>Rankin [3] - 10:23,</p>				

<p>33:8, 34:2, 34:3, 34:5, 34:23 relief [10] - 13:10, 14:7, 14:12, 24:20, 27:8, 27:9, 27:16, 33:12, 34:19, 34:21 remain [2] - 3:4, 10:23 remaining [3] - 7:20, 8:3, 30:8 remember [5] - 32:18, 33:2, 39:6, 40:8, 40:13 reminded [1] - 40:14 removed [1] - 20:22 rendered [1] - 20:15 reopen [1] - 38:11 rephrase [1] - 29:3 report [15] - 10:20, 15:18, 15:19, 16:2, 17:3, 17:13, 17:21, 22:20, 26:24, 28:18, 37:19, 38:5, 39:6, 40:18 reports [3] - 9:20, 26:10, 36:12 representation [1] - 5:23 representatives [1] - 5:3 represented [1] - 10:16 reps [1] - 8:2 request [1] - 40:12 requirement [1] - 13:11 requirements [1] - 27:24 reserves [1] - 9:18 resolve [1] - 25:24 respect [4] - 26:12, 33:11, 39:12, 39:21 respond [2] - 16:13, 39:8 responds [1] - 10:5 response [7] - 9:20, 24:24, 25:12, 29:13, 34:17, 35:11, 35:16 responses [2] - 26:23, 40:19 responsibility [1] - 7:25 responsible [2] - 14:19, 14:25 Restraining [1] - 5:8 result [2] - 23:24, 33:18 results [3] - 19:23, 33:6, 35:24 revealed [1] - 22:22</p>	<p>review [1] - 17:4 Richard [1] - 7:22 Rives [2] - 2:9, 3:20 road [4] - 13:19, 17:12, 35:2, 37:14 roughly [1] - 9:10 rule [1] - 38:10 ruled [1] - 23:15 Russo [1] - 38:23</p> <p style="text-align: center;">S</p> <p>sable [1] - 19:13 safe [1] - 39:1 sake [1] - 4:6 sale [3] - 7:14, 21:22, 26:16 saw [2] - 37:16, 37:20 schedule [1] - 36:8 school [1] - 4:3 scope [2] - 34:13, 35:4 seafood [1] - 4:18 Seafood [18] - 2:7, 3:11, 4:13, 4:14, 4:17, 5:7, 5:16, 5:20, 6:9, 7:8, 7:24, 8:22, 21:9, 22:2, 22:15, 22:23, 23:24 Seafood's [4] - 5:22, 9:11, 9:20, 23:9 Seafoods [2] - 4:18, 24:7 search [1] - 8:6 seated [1] - 3:4 Seawater [1] - 13:22 Section [10] - 13:8, 13:9, 13:11, 13:21, 20:9, 24:19, 27:8, 27:10, 33:11 sector [1] - 35:24 secured [2] - 5:8, 6:5 see [2] - 10:9, 17:13 seeking [9] - 13:10, 13:18, 14:6, 15:3, 27:7, 27:9, 27:16, 33:6, 33:12 seem [2] - 8:5, 10:15 segments [1] - 20:14 sell [2] - 30:13 selling [2] - 21:9, 28:22 sense [2] - 18:18, 39:16 separate [10] - 27:3, 33:22, 33:24, 33:25, 34:2, 36:4, 37:5, 37:12, 37:21 separately [1] - 37:22 serious [3] - 7:5, 7:16,</p>	<p>12:25 seriously [1] - 7:25 served [1] - 39:7 Service [2] - 10:25, 23:17 services [6] - 20:15, 31:2, 31:4, 31:13, 31:18, 32:10 session [1] - 3:8 set [2] - 3:10, 15:16 sets [1] - 26:7 setting [2] - 14:17, 14:23 settled [1] - 14:21 Settlement [1] - 25:22 several [1] - 12:6 Sexton [7] - 11:12, 16:1, 17:12, 17:24, 18:21, 20:4, 35:21 shakes [1] - 11:10 share [19] - 11:1, 11:3, 11:8, 11:14, 14:2, 18:25, 19:5, 19:11, 19:18, 22:17, 23:1, 23:5, 23:14, 23:19, 23:25, 24:1, 24:5, 24:6, 35:20 shares [1] - 19:1 Shield [2] - 20:11, 20:12 shift [1] - 7:2 shore [2] - 26:17, 29:6 show [2] - 14:1, 18:9 shows [2] - 20:23, 22:10 shrimp [4] - 12:4, 12:5, 12:9, 26:19 side [6] - 9:8, 10:11, 16:10, 16:17, 26:17, 29:6 sieve [1] - 5:17 sieve-like [1] - 5:17 significant [2] - 22:8, 24:1 significantly [2] - 16:21, 38:2 simply [1] - 27:19 single [1] - 21:20 situation [4] - 9:22, 17:22, 36:17, 37:17 six [14] - 8:10, 9:1, 9:9, 9:12, 10:21, 11:9, 14:4, 14:5, 15:9, 16:11, 17:19, 36:4, 37:5, 37:8 six-market [2] - 14:5, 15:9</p>	<p>sliding [1] - 32:3 slightly [1] - 6:25 small [1] - 35:17 Snider [1] - 3:21 SNIDER [1] - 2:8 Society [1] - 20:13 sold [1] - 29:6 sole [2] - 16:25, 19:14 solely [1] - 13:6 somewhat [1] - 25:10 sort [3] - 8:12, 10:5, 12:15 south [5] - 9:16, 11:22, 12:7, 14:6, 18:16 speaks [3] - 17:24, 27:13, 31:22 specialist [2] - 12:5, 19:13 species [8] - 11:1, 11:4, 11:18, 19:2, 19:12, 19:25, 26:21, 36:2 specific [3] - 20:3, 26:20, 30:10 specifically [1] - 22:16 speculative [2] - 29:15, 34:15 spending [1] - 24:14 spoken [1] - 18:1 spring [1] - 13:2 stage [2] - 24:8, 30:3 stand [1] - 23:20 standing [6] - 8:16, 13:11, 13:13, 27:11, 32:14, 32:25 start [1] - 4:9 starting [2] - 3:14, 8:17 State [1] - 12:25 state [1] - 33:10 statement [2] - 8:24, 10:8 statements [1] - 18:12 States [1] - 3:7 states [2] - 9:1, 9:5 stating [1] - 7:22 status [3] - 22:3, 22:19, 36:3 stayed [2] - 6:15, 16:13 Ste [1] - 2:10 steamed [1] - 12:6 step [1] - 20:22 Stephens [1] - 6:1 steps [1] - 23:17 still [9] - 6:1, 10:13, 10:21, 14:10, 18:5, 27:14, 27:20, 36:8,</p>	<p>36:17 Stoel [2] - 2:9, 3:20 stop [3] - 6:4, 22:2, 30:13 stopped [1] - 30:12 storage [2] - 4:24, 22:6 strategy [1] - 38:12 straw [1] - 7:11 Street [2] - 2:4, 20:23 stretch [1] - 7:24 struggle [1] - 8:17 stuck [1] - 17:18 students [2] - 3:24, 4:6 style [1] - 4:3 subject [1] - 17:8 submitted [2] - 35:15, 35:22 subsequently [1] - 6:13 substantially [1] - 36:23 substantive [1] - 25:12 substitution [3] - 17:14, 38:1, 39:13 successful [1] - 22:4 sue [1] - 13:16 suffer [1] - 20:3 suffered [2] - 8:20, 28:7 suggested [2] - 30:3, 32:3 suggestion [2] - 30:20, 31:10 suing [2] - 13:8, 13:9 suit [3] - 6:3, 24:3, 24:16 summarizes [1] - 33:10 summary [4] - 22:13, 24:9, 35:16, 36:14 Sunday [1] - 3:2 supplement [1] - 9:19 supply [1] - 34:7 support [1] - 13:2 supported [2] - 18:19, 18:21 suppressing [1] - 33:17 suppression [3] - 14:20, 33:18, 35:25 Supreme [4] - 13:20, 20:7, 31:16, 32:2 surprise [1] - 5:19 surprised [2] - 39:25, 40:1 surprising [1] - 38:20</p>
--	---	--	--	---

<p>survive [1] - 28:15</p> <p>SW [2] - 2:4, 2:10</p> <p>system [5] - 5:18, 19:18, 22:16, 23:14, 36:21</p>	<p>tool [1] - 32:22</p> <p>total [2] - 16:5, 19:21</p> <p>totality [1] - 37:23</p> <p>town [1] - 22:3</p> <p>transaction [9] - 4:16, 5:9, 5:11, 5:19, 5:23, 6:4, 23:23, 25:14, 25:24</p> <p>travels [1] - 40:1</p> <p>trawl [2] - 26:19, 36:1</p> <p>trawl-caught [2] - 26:19, 36:1</p> <p>treat [1] - 10:21</p> <p>treated [1] - 30:17</p> <p>treatment [1] - 31:6</p> <p>treble [2] - 13:8, 13:17</p> <p>trial [1] - 10:9</p> <p>tributary [1] - 9:13</p> <p>tried [1] - 17:14</p> <p>TRO [1] - 6:5</p> <p>true [1] - 7:19</p> <p>Trust [1] - 3:25</p> <p>trust [29] - 8:16, 8:20, 9:24, 10:1, 10:14, 12:20, 13:5, 20:3, 20:6, 24:13, 24:22, 24:24, 26:8, 27:13, 27:17, 27:25, 32:4, 32:8, 32:13, 32:24, 33:1, 33:11, 34:13, 35:4, 36:13, 38:7, 38:14, 39:21</p> <p>try [2] - 7:13, 28:14</p> <p>trying [8] - 8:22, 15:14, 18:5, 25:18, 33:2, 34:16, 37:15, 40:8</p> <p>tuna [1] - 21:1</p> <p>turn [2] - 22:10, 34:2</p> <p>turning [1] - 7:7</p> <p>two [12] - 6:6, 8:3, 8:8, 10:22, 16:23, 18:11, 19:12, 19:25, 28:15, 28:24, 35:1, 41:7</p> <p>type [1] - 33:11</p> <p>typical [1] - 10:2</p>	<p>10:17, 10:20, 13:4, 13:8, 13:9, 13:10, 19:18, 27:9, 31:5</p> <p>underlying [1] - 25:21</p> <p>unfair [1] - 17:14</p> <p>unfolded [1] - 16:20</p> <p>United [1] - 3:7</p> <p>University [1] - 3:25</p> <p>unlawful [2] - 13:4, 31:19</p> <p>unrelated [1] - 33:23</p> <p>unusual [1] - 37:16</p> <p>up [14] - 5:20, 5:22, 6:6, 6:16, 16:1, 16:25, 17:2, 17:10, 18:2, 20:3, 21:25, 32:4, 36:8, 38:13</p> <p>upheld [2] - 23:14, 24:4</p> <p>US [1] - 26:19</p>	<p>8:9, 9:2, 9:5, 9:11, 9:15, 10:17, 11:3, 11:9, 12:5, 12:6, 12:10, 12:11, 16:10, 19:4, 19:6, 21:23, 22:3, 22:7, 26:25, 27:1, 27:2, 28:4, 29:2, 29:7, 29:25, 30:1, 30:4, 30:5, 30:22, 33:17, 33:19, 35:24, 36:16, 37:1, 37:2, 37:7</p> <p>Whaley [18] - 5:3, 5:9, 9:3, 10:23, 11:7, 14:15, 14:16, 16:7, 18:22, 21:5, 21:7, 25:22, 29:22, 35:15, 36:23, 37:1, 37:3</p> <p>whatsoever [1] - 15:2</p> <p>white [1] - 26:17</p> <p>whiting [8] - 8:7, 11:2, 11:21, 11:22, 18:25, 24:5, 26:17, 35:25</p> <p>whole [3] - 9:5, 15:16, 29:18</p> <p>wholesale [1] - 19:24</p> <p>wide [3] - 19:4, 26:21, 36:16</p> <p>winded [1] - 29:13</p> <p>wintertime [1] - 16:23</p> <p>withdrawn [1] - 25:14</p> <p>withheld [1] - 40:6</p> <p>witness [6] - 6:23, 8:24, 9:7, 10:3, 10:7, 15:12</p> <p>words [2] - 21:14, 27:9</p> <p>works [3] - 17:6, 21:13, 37:12</p> <p>worth [1] - 30:24</p> <p>wrapping [1] - 21:25</p> <p>write [1] - 16:1</p> <p>written [1] - 22:19</p> <p>wrong-doers [1] - 32:15</p> <p>wrongdoing [1] - 33:1</p> <p>Wyland [1] - 9:3</p>	
<p>T</p> <p>tails [1] - 4:22</p> <p>Temporary [1] - 5:8</p> <p>ten [2] - 7:4, 12:6</p> <p>tendered [3] - 8:25, 9:8, 16:16</p> <p>term [1] - 30:17</p> <p>terminated [1] - 25:14</p> <p>terms [7] - 5:11, 13:23, 18:19, 24:21, 32:7, 36:17, 38:12</p> <p>test [2] - 27:22, 27:24</p> <p>testify [2] - 15:12, 15:16</p> <p>testimony [4] - 29:20, 30:6, 41:2, 41:3</p> <p>THE [27] - 3:4, 3:13, 3:18, 3:22, 5:11, 8:4, 10:13, 12:13, 14:9, 15:10, 18:1, 19:7, 20:20, 21:1, 24:12, 24:23, 25:7, 28:9, 31:1, 33:13, 34:17, 35:6, 36:22, 38:9, 38:21, 40:13, 41:4</p> <p>themselves [1] - 3:15</p> <p>then-expert [1] - 6:24</p> <p>theory [10] - 7:24, 10:17, 14:10, 14:13, 14:15, 14:16, 15:5, 28:16, 28:20, 29:4</p> <p>thereby [1] - 25:24</p> <p>third [2] - 7:13, 7:18</p> <p>threatened [3] - 27:14, 27:20, 28:6</p> <p>three [13] - 7:10, 7:20, 8:3, 8:4, 8:7, 10:15, 21:20, 22:1, 26:16, 26:25, 27:1, 30:7, 35:2</p> <p>threshold [4] - 8:15, 10:13, 24:13, 26:5</p> <p>tied [1] - 9:12</p> <p>Tim [1] - 3:20</p> <p>TIMOTHY [1] - 2:8</p> <p>tiny [1] - 25:6</p> <p>today [8] - 4:1, 6:22, 25:25, 29:17, 31:24, 35:14, 38:10, 39:23</p> <p>together [3] - 4:15, 15:18, 31:8</p>	<p>U</p> <p>ultimately [4] - 5:4, 6:12, 6:17, 11:10</p> <p>umbrella [9] - 10:17, 14:10, 14:13, 14:15, 14:22, 14:25, 15:1, 15:5</p> <p>unavailability [1] - 36:7</p> <p>unconvinced [1] - 39:3</p> <p>under [11] - 4:16, 10:8,</p>	<p>V</p> <p>valid [1] - 19:5</p> <p>valuable [1] - 26:22</p> <p>value [2] - 19:10, 36:1</p> <p>variety [1] - 5:2</p> <p>various [1] - 3:24</p> <p>VC [1] - 30:14</p> <p>veer [1] - 38:2</p> <p>venturer [2] - 21:15, 21:16</p> <p>versus [2] - 3:11, 20:12</p> <p>vessel [2] - 19:18, 35:25</p> <p>vessels [2] - 16:24, 23:11</p> <p>view [1] - 18:15</p> <p>Virginia [1] - 20:13</p>	<p>W</p> <p>wages [1] - 21:2</p> <p>waited [1] - 38:17</p> <p>waiting [2] - 22:9</p> <p>wants [1] - 28:23</p> <p>Washington [6] - 4:20, 10:22, 12:8, 22:3, 27:1, 28:4</p> <p>waste [1] - 4:22</p> <p>waterfront [1] - 5:18</p> <p>wave [1] - 10:8</p> <p>week [3] - 5:24, 7:9, 41:7</p> <p>well-written [1] - 22:19</p> <p>west [1] - 16:9</p> <p>West [39] - 4:19, 5:12,</p>	<p>Y</p> <p>year [4] - 22:9, 28:24, 31:15, 35:19</p> <p>years [7] - 8:9, 8:10, 11:22, 12:6, 20:2, 24:2, 28:24</p> <p>young [1] - 36:18</p>
			<p>Z</p> <p>zone [2] - 11:4, 23:2</p>	